No. 09-1483

IN THE

Supreme Court of the United States

OLGA DOMÍNGUEZ CASTRO, SANDRA J. GUZMÁN HERNÁNDEZ, MILITZA LÓPEZ MATEO, CARLOS RIVERA FIGUEROA,

Petitioners,

v.

GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO, SECRETARY OF JUSTICE, HON. LUIS FORTUNO, GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, DEPARTMENT OF JUSTICE, DEPARTMENT FOR THE FAMILY, BOARD OF FISCAL RESTRUCTURING AND STABILIZATION OF PUERTO RICO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2009, the legislature of Puerto Rico responded to a dire fiscal emergency by enacting Public Act No. 7, a comprehensive fiscal stabilization plan that included revenue-raising provisions, financing measures, and expenditure reductions, including a government-wide reduction in force of career employees strictly according to seniority if other measures did not result in adequate cost savings. Petitioners, four non-unionized employees of the Commonwealth of Puerto Rico who were laid off based on Act No. 7, challenged that law on several bases in the Puerto Rico courts, but did not raise a challenge based on the Contract Clause of the United States Constitution. In a separate, consolidated case, the Puerto Rico Supreme Court rejected a Contract Clause challenge to Act No. 7 brought by different plaintiffs who were unionized and claimed an impairment of their collective bargaining agreement. Petitioners now seek to raise that Contract Clause claim.

The questions presented are (1) whether petitioners have properly preserved any Contract Clause claim, and (2) whether the Puerto Rico Supreme Court applied the correct legal standards in rejecting the Contract Clause challenge to Act No. 7.

PARTIES TO THE PROCEEDINGS

Petitioners are Olga Domínguez Castro, Sandra J. Guzmán Hernández, Militza López Mateo, and Carlos R. Rivera Figueroa.

Respondents on whose behalf this brief is filed are: the Government of the Commonwealth of Puerto Rico; the Secretary of Justice of Puerto Rico; the Honorable Luis Fortuño, Governor of Puerto Rico; the Department of Justice;* the Department for the Family; the Board of Fiscal Restructuring and Stabilization of Puerto Rico; and the Child Support Administration (A.S.U.M.E.).

The other persons identified by petitioners as parties to the proceedings are: Erika Vispo Figueroa; Zoraida Martínez Román; Saudy Leilany Hernández Colón; Jessenia Ayala Maldonado; Kristy J. González Bou; Jesús Cora Romero; Magdalena Burgos Santiago; Félix Agosto Maysonet; William J. Peña Peña; Nayda Santiago Rodríguez; Elena Mojica Rivera; Evelyn Montañez Medina; Sigfredo Rosado Hernández; José J. Santiago Rodríguez; Zuheilly Roldán Sierra; Epifanio García Sánchez; José López Rodríguez; Guiendolyn Rampersad Laboy; Marangely De Jesús Bolorín; Iván Morales López; Biterbo Caldero Pérez; Luis A. Ramos Comas; Olga L. Páez Guerrero; Patricia Cardenales Velázquez; David Báez Dávila; Dumaris Cuevas Toledo; Noemí De Jesús Centeno; Margarita Rivera Molina; Juan A. José Aquino; José A. Velasco Maldonado; Rosa

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* Petitioners listed the Department of Justice as a respondent in the caption of this case, but they did not list the Department of Justice as a respondent in the statement of the parties to the proceedings.

García-Janer; Nitza M. Pacheco Muñoz; Vilma Ocasio Camacho; Juan Carlos Sánchez Encarnación; Mirys J. Rodríguez Jiménez; Yolanda Alfonso Mateo; Mayra Rosario Torres; Jaime Rivera Rivera; Raymond de Jesús Ildefonso; Wigberto Medina Vellón; Frances Rodríguez Ortiz; Nancy Dannette Quiñones Acevedo; Olga I. Vázquez Vázquez; Eduardo Rivera Morales; Jessica Flores Vega; Ingrid Rodríguez Colón; Mireillie Rodríguez Rodríguez; Magda L. Vázquez Pérez; José A. Ledee Rodríguez; Oscar Luna Ugarte; Maritza Botet Velázquez; Sixto Juan Huaca Torres; Nellie Wharton García; Omar Figueroa Colón; Vivian Delgado Rodríguez; Leemaris Rodríguez Aponte; Lydia Ramírez Álvarez; María J. Román Torres; Glenda Arriaga Pérez; Luz Roque Ortiz; Jorge Hernández Acosta; Carmen Morales Santiago; Wilma Rosado de Jesús; José Arnaldo Velázquez Burgos; Carmen de León Velázquez; Omaira Alomar Bermúdez; María Marti Camacho; Ivelisse A. Marrero Marcano; Luis Vallés Pérez; Linis Pont Toro; Aileen Morales Orengo; Linda Estrada Rivera; Lucién Gastón Martínez; Yanira Villegas Cruz; Ivette Rivera Zayas; Amarilys Ortiz Casillas; Linette González Aponte; Ramón Ortiz Rosario; Wilson de Jesús Rivera; William García Ceboller; María Menítez López; Luz León Rivera; Ruth E. Rivera Rosario; Héctor Nieves Rivera; José Torres Nieves; Ramón L. Guzmán Rivera; Luis M. Reyes Mendoza; Yarigna Osorio Santiago; Ruth Fontánez Sánchez; Javier Júñez Otero; Raúl Arroyo Boada; Mayda González González; Yaritza Sánchez Torres; Marangely De Jesús; Bebalis Ortiz Guzmán; Judith López Rodríguez; Allen Mejía; Emma Marrero Pagán; Nelson A. Guzmán Algarín; Migdalia Colón Sánchez and Sandra Plaza Salvá.

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BRIEF IN OPPOSITION

STATEMENT

This case arises out of the effort by the legislature of the Commonwealth of Puerto Rico to address in a comprehensive manner a fiscal deficit of unprecedented scope—a deficit that, if unredressed, could lead swiftly to a crisis in Puerto Rico's economy and governmental operations. The legislature determined that, to forestall that crisis, a combination of measures affecting

every aspect of the government was required. Through Public Act No. 7, the legislature authorized a fiscal stabilization plan consisting of a combination of new taxes, financing measures, and expenditure reductions, one of which was a phased reduction of the government workforce. In the event that layoffs of career government employees proved necessary, the Act provided that the reductions in force be carried out fairly and with respect for employees' seniority. Petitioners contend that the layoffs violate their rights under the Contract Clause of the Constitution, U.S. Const., art. I, § 10, cl. 1, which provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." Petitioners ask this Court to clarify the standard for resolving Contract Clause challenges.

Petitioners, however, have failed to identify any contract, much less any specific contractual provision, to which they are parties that would be impaired by the legislation under challenge. Although the judgment of the Supreme Court of Puerto Rico does address an alleged contractual impairment, that impairment was alleged below only by *other* plaintiffs whose case was consolidated with that of petitioners. Because there can be no Contract Clause violation unless there is a contractual relationship that a change in law substantially impairs, *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992), petitioners may not now raise a Contract Clause claim. In any event, the Contract Clause claim that the court below *did* address was decided correctly, and in accordance with the standards laid out by this Court and the uniform way those standards have been applied by the United States Courts of Appeals.

A. Act No. 7

The legislature of the Commonwealth of Puerto Rico passed Act No. 7 in March 2009 in response to an unprecedented "fiscal crisis." Pet. App. 291a. In the law's extensive Statement of Motives (*id.* 295a-324a), the legislature explained that the Commonwealth was facing a serious $3.2 billion structural deficit equal to 42 percent of estimated revenues. That deficit resulted from, among other things, negative economic growth since early 2006. The Commonwealth's Planning Board, however, had consistently projected positive economic growth. Thus, tax revenues had fallen far short of what the Commonwealth had anticipated and expenditures had far exceeded revenues. *Id.* 295a-301a.

The resulting structural deficit exposed the Commonwealth to a potentially disastrous downgrade in its credit rating. Although bonds issued by the fifty States have credit ratings of A1 or higher, Puerto Rico bonds had fallen from a rating of Baa1/A- in 2004 to Baa3/BBB- in 2009. That rating left Puerto Rico government debt just a single step above "junk" status. The downgrading of Puerto Rico's credit to junk status would have reduced the value of its outstanding obligations by 30 to 50 percent. The impact on the island of such a destruction in wealth would have been devastating, as local owners hold more than $10 billion in Puerto Rico government obligations. The Commonwealth and other government bondholders also would have been required immediately to post almost $900 million in additional collateral to secure their obligations. Pet. App. 302a-304a.

A downgrade to junk status would also have severely impaired Puerto Rico's ability to carry out its

governmental operations. Investors who had traditionally acquired Puerto Rico bonds but who are required to maintain assets in safe investments could not have continued to invest in those bonds. Without recourse to public financing, the government could not have paid employee salaries or provided citizens with essential services. Those consequences would have had a crippling effect on Puerto Rico's economy, leading to the loss of 130,000 jobs in a jurisdiction whose total population is just four million people. According to the Planning Board's estimates, unemployment could have reached 25 percent. Pet. App. 304a-306a.

In light of the foregoing, the legislature found that Puerto Rico faced a "grave fiscal emergency." Pet. App. 308a. The legislature determined that if it attempted to bridge the gap between projected revenues and expenditures by raising taxes alone, it would need to increase taxes by a devastating 42 percent. *Id.* 309a-310a. Deciding that it "[could not] consider such an option," the legislature enacted a combination of revenue-raising measures, cutbacks, and financing measures. *Id.* 310a-311a.

To raise additional revenue, Act No. 7 increased taxes on cigarettes, wine, and beer (Pet. App. 330a-331a, 337a-341a), and modified Puerto Rico's alternate basic tax on individuals (*id.* 326a-329a). Other provisions imposed a series of temporary special taxes, including "special emergency surtax[es]" on high-income individuals, corporations, banks, and insurance companies (*id.* 312a, 343a-344a, 352a-366a), and a "special emergency tax" on residential real property valued at more than $210,000 (*id.* 312a, 347a-352a).

In addition to these revenue-raising measures, the legislature ordered cutbacks. Because payroll operat-

ing expenses constitute 67 percent of the government's discretionary expenditure, the legislature determined that it was impracticable to cut the amount necessary without affecting the payroll. Pet. App. 313a-314a.[1] It also found that positions had to be eliminated to accomplish the needed payroll reductions; for the necessary cost savings to be achieved by reducing work hours, Commonwealth employees would have had to reduce their work schedules by two to three days each week. Such a furlough would have had an "enormous impact" on employees' income and would have "render[ed] the Government practically inoperative." *Id.* 319a.

To reduce payroll expenses, the legislature adopted a three-phase plan. Under Phase I, public employees who had served for twenty or more years were offered the option of a ten-percent reduction in their work schedule, and public employees generally were offered incentives for voluntary resignations. Pet. App. 316a, 373a-379a.

Under Phase II, which was to go into effect only if savings generated by Phase I were insufficient (Pet. App. 317a, 379a), Act No. 7 called first for the layoff of government employees holding transitory or irregular appointments (*id.* 379a-383a). It then directed the layoff of career employees based exclusively on seniority: employees with fewer years of public service would be laid off before more senior employees. *Id.* 317a, 383a-390a.

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[1] To cut the necessary amount without affecting payroll, the government would have had to eliminate 74 percent of all discretionary, non payroll expenditures. Pet. App. 313a.

Finally, Phase III called for a two-year freeze in raises in salary, fringe benefits, and other financial compensation for all public employees, starting in July of 2009. Phase III also called for a two-year suspension of all provisions, regardless of source—including those contained in laws, collective bargaining agreements and other agreements—related to promotions, demotions, layoffs, transfers, and task distribution. Pet. App. 318a-319a, 381a-383a, 390a-395a.

B. The Cases Resolved In The Decision Below

1. Act No. 7 was adopted in March 2009. The Commonwealth proceeded to implement Phase I of Act No. 7's payroll-reduction plan. After completion of that phase, Act No. 7 had not accomplished the necessary level of savings, and so Phase II was implemented. *See* Pet. App. 4a, 317a.

The four petitioners who have sought certiorari were all non-unionized, career employees of the Government of Puerto Rico. *See* Pet. App. 5a n.3; Pet. 5. In accordance with Act No. 7, each received a notice stating that, due to his or her level of seniority, he or she would be laid off. Pet. App. 7a-8a, 460a-467a. Petitioners then brought suit in the Court of First Instance of San Juan challenging the constitutionality of Act No. 7 and seeking an injunction against the layoffs. *Id.* 8a, 423a-451a.

In their complaint, petitioners alleged that Act No. 7 violated the Constitutions of both the United States and Puerto Rico because the law denied them procedural and substantive *due process*. Specifically, they alleged that Act No. 7 deprived them of procedural due process because it provided inadequate mechanisms for challenging whether an employee qualifies for a senior-

ity-based layoff. Pet. App. 441a-442a. They also alleged that Act No. 7 deprived them of substantive due process because it provided for layoffs even though the government had not exhausted other measures required under a previous civil-service law as a precondition for layoffs (such as relocation of employees to offices where personnel were needed, retraining of employees to fill other government positions, compelling employees to take unpaid leave, reduction in work schedules, and reclassification or demotion of employees). *Id.* 443a-444a. Petitioners alleged that they had a proprietary right in their civil-service jobs and that there was no "rational nexus" between the findings in the Statement of Motives and the deprivation of constitutional rights allegedly accomplished by Act No. 7. *Id.* 446a-447a.

Act No. 7 includes a mechanism for expediting challenges to the constitutionality of its provisions directly in the Supreme Court of Puerto Rico. Pet. App. 430a.[2] The Commonwealth petitioned that court to remove this case from the Court of First Instance and to certify the case for initial consideration before the Puerto Rico Supreme Court. Pet. App. 486a, 502a-504a. The Commonwealth also moved in both the Court of First Instance and the Puerto Rico Supreme Court for proceedings in the Court of First Instance to be stayed. *Id.* 473a-476a, 477a-485a. On October 15, 2009, the Puerto

[2] Section 69 of Act No. 7 states that "[t]he Supreme Court of the Commonwealth of Puerto Rico shall issue a writ of certification by petition to immediately bring before it and resolve any matter pending before the Court of First Instance or before the Court of Appeals when the issue is the validity or constitutionality of this special Act or any challenge thereof on any grounds." Pet. App. 430a.

Rico Supreme Court granted the petition for certification and stayed proceedings in the Court of First Instance. *Id.* 722a-725a. This case then became case CT-2009-4 in the Puerto Rico Supreme Court.

Around the same time, three other groups of plaintiffs commenced other actions in courts of the Commonwealth of Puerto Rico challenging the constitutionality of Act No. 7. Case CT-2009-5 was brought on October 13, 2009, in the Court of First Instance of San Juan. *See* App. 1a-14a; *see also id.* 15a-25a (amended complaint). It was removed to the Puerto Rico Supreme Court on November 4, 2009. Case CT-2009-6 was brought on October 21, 2009, in the Court of First Instance of Ponce by various unionized employees. *See* App. 26a-36a. It was removed to the Puerto Rico Supreme Court on November 2. Case CT-2009-9 was brought in the Court of First Instance of San Juan on November 6, 2009. *See* App. 37a-64a. It was removed to the Puerto Rico Supreme Court on December 9.[3]

In the Supreme Court of Puerto Rico, the parties in each of these actions filed briefs on the issues raised in their respective complaints. Petitioners' brief reiterated the allegations in their complaint that Act No. 7 violated their due process rights under the U.S. and

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[3] The case numbers used in this opposition and in the Puerto Rico Supreme Court's decision are those assigned by that court. The cases were assigned different numbers when originally filed in the courts of first instance. Case CT-2009-5, *Kristy Gonzalez Rou et al.* v. *Commonwealth of Puerto Rico*, was originally KPE-2009-4254; Case CT-2009-6, *Zoraida Martínez Román* v. *Commonwealth of Puerto Rico*, was originally JPE-2009-0788; Case CT-2009-9, *Erika Vispo Figueroa* v. *Commonwealth of Puerto Rico*, was originally KPE 2009-4556. Petitioners' case (CT-2009-4) was originally KPE 2009-4186.

Puerto Rico Constitutions, and argued that Act No. 7 violated Puerto Rico law by depriving them of a right they had acquired under previous legislation. Their brief never developed an argument that Act No. 7 violates the Contract Clause, nor did it even allege a contractual impairment. Pet. App. 828a-885a.[4]

Of the above-described cases, only the complaints filed in CT-2009-6 and CT-2009-9 alleged Contract Clause claims. App. 30a-31a; App. 59a-62a. The plaintiff in CT-2009-9, however, did not argue the Contract Clause issue in her brief to the Puerto Rico Supreme Court after removal. The plaintiffs in CT-2009-6

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[4] In a single passing reference in a largely descriptive section titled "Law No. 7 of March 9, 2009, and the Layoffs," petitioners' brief stated that "[Act No. 7] certainly cannot exclude constitutional provisions set forth in the Constitution of the Commonwealth of Puerto Rico and the Constitution of the United States of America regarding due process and the impairment of contractual obligations." Pet. App. 863a. That brief went on to argue, in separate sections, petitioners' due process and acquired-rights theories for why Act No. 7 is unconstitutional. The brief never elaborated on the passing reference to constitutional protection for contractual obligations.

Petitioners assert that they "raised their contracts clause claim as soon as the case was moved to the Supreme Court of Puerto Rico" (Pet. 9), but that is inaccurate. Petitioners merely included, in a *motion* requesting that the Puerto Rico Supreme Court issue a provisional order in aid of jurisdiction, a short statement to the effect that the "concept of merit and retention" are "acquired rights that cannot be altered by subsequent laws" and therefore "Act No. 7 impermissibly modifies the employment contracts of career employees ... [in violation of] Art. II, Section 7 [of the] Constitution of the *Commonwealth of Puerto Rico*." Pet. App. 728a (emphasis added). Petitioners' motion was denied in an order issued on October 26, 2009. *Id.* 821a-827a. As discussed, petitioners never reiterated or developed this theory in their briefing.

pointed out, in both their complaint and their brief to the Puerto Rico Supreme Court, that they were unionized employees covered by a collective bargaining agreement, and they argued that Act No. 7 unconstitutionally violated that agreement by authorizing layoffs in accordance with criteria different from those contractually proscribed. App. 30a-31a; App. 87a-88a.[5]

2. On February 2, 2010, the Puerto Rico Supreme Court issued an opinion consolidating the four above-described cases (*see* Pet. App. 5a n.2) and deciding all of them. In that decision, the Puerto Rico Supreme Court dismissed the claims raised by these petitioners—that Act No. 7 violated procedural and substantive due process, and that it improperly deprived plaintiffs of a right acquired under prior legislation. *Id.* 29a-73a.

In the same opinion, the court also rejected the Contract Clause claim brought by the plaintiffs in case CT-2009-6. Pet. App. 93a-97a. In so doing, the court explicitly stated that it was addressing the claim raised by *those plaintiffs*. *See id.* 93a.[6] The court first con-

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[5] The unionized plaintiffs' complaint and brief in the Puerto Rico Supreme Court in CT-2009-6 also made certain references to the impairment of a "work contract executed" or "employment contract subscribed" by the parties. App. 28a, 31a; 2009-6 Br. 74a-75a. Plaintiffs, however, did not specifically identify what "work contract" or "employment contract" they had entered into, and provided no further elaboration as to how they had any contractual rights related to their employment from sources other than their collective bargaining agreement. The Puerto Rico Supreme Court understandably did not take these cryptic references to a "work contract" or "employment contract" to raise a claim for the impairment of contractual rights.

[6] After laying out the standards relevant to its Contract Clause analysis, the Puerto Rico Supreme Court began the section

cluded that Act No. 7 impaired contractual rights contained in the collective bargaining agreement applicable to those unionized employees by providing that layoff eligibility would be determined in a manner different than that specified in the agreement—*i.e.*, instead of relying on merit to select those who would be laid off, employees would be laid off based solely on seniority. *Id.* 93a-94a.

The court further observed that, under well-settled Contract Clause case law, a state may impair contracts when the impairment is reasonable and necessary to advance an important public interest. Pet. App. 94a. It also noted, however, that in cases involving a government's impairment of its own contracts, "contrary to the cases on private contracting[,] it is not appropriate to give full deference" to the legislature's determination of reasonableness and necessity. *Id.* 90a.

The court then concluded, based on the facts laid out in Act No. 7's Statement of Motives—which neither the complaint nor the brief filed by the CT-2009-6 plaintiffs alleged to be inaccurate—that the legislature's decision to suspend the collective bargaining agreement's mechanism for determining which employees would be laid off was reasonable and necessary. Noting that the legislature's choice "to use exclusively the criterion of seniority" was for the purpose of "ensur[ing] fair application of the objective criterion ... through the whole government," and that the seniority-based method aided the Commonwealth in quickly and decisively re-

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that applied those standards by stating that the plaintiffs "in CT-2009-6 are unionized government employees ... [who] argue, very briefly, that Act No. 7 ... impairs the obligations ... of the[ir] collective [bargaining] agreement." Pet. App. 93a.

ducing its public workforce, the court ruled that the Commonwealth had demonstrated "an important public interest in taking corrective action." Pet. App. 95a. The court also endorsed the legislature's determination that "'none of the other alternatives [available to the legislature] are compatible ... or viable.'" *Id.* (quoting from the Statement of Motives). The court therefore held that it is "entirely reasonable and necessary for the legislat[ure] to establish an objective criterion as is seniority in the workplace." *Id.* 97a.

In light of its conclusions, the Puerto Rico Supreme Court entered judgment declaring Act No. 7 constitutional. Pet. App. 110a-111a. The court remanded case CT-2009-9 to the Court of First Instance for consideration of a non-constitutional claim. *Id.* 11a n.11, 109a, 111a.

3. Petitioners in this case moved for reconsideration in the Puerto Rico Supreme Court. Pet. App. 1059a-1090a. In their motion, they reiterated their due process and acquired rights arguments. *Id.* 1071a-1080a. They did not raise a Contract Clause claim or assert that they had presented a Contract Clause claim that the Puerto Rico Supreme Court had failed to evaluate. They argued that the Puerto Rico Supreme Court's decision was flawed because no evidence had been adduced, but they linked this argument to a new allegation that the removal procedure amounted to an improper encroachment on the traditional functions of the judiciary. *Id.* 1068a-1071a. Petitioners at no point asked the Puerto Rico Supreme Court to employ the

special evidence-taking procedure available for cases in which that court serves as the court of first instance.[7]

On March 5, 2010, the Puerto Rico Supreme Court denied the motion for reconsideration. Pet. App. 287a-289a. The four plaintiffs in CT-2009-4 then filed a petition for certiorari in this Court. The plaintiffs in the other three cases decided by the Puerto Rico Supreme Court's February 2, 2010, opinion and judgment did not seek review in this Court.

ARGUMENT

I. The Court Should Not Review Any Contract Clause Claim In This Case Because Petitioners Did Not Raise Such A Claim In The Puerto Rico Courts

A fundamental prerequisite of this Court's review of federal constitutional questions is that the same question has been pressed or passed on by the court below. *See Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). That requirement has not been met in this case. Contrary to petitioners' assertion (Pet. 12), the federal question petitioners now ask this Court to address was not timely or properly raised by them in the Puerto Rico courts. The Supreme Court of Puerto Rico did address a Contract Clause claim related to Act No. 7 raised by other, differently-situated litigants. But petitioners are attempting to assert a different claim for

[7] Under Puerto Rico Supreme Court Rule 16(I), a party to such a case may move to have the court receive evidence. The court may hold an evidentiary hearing or appoint a Special Commissioner to receive evidence and prepare a report on it for the court.

the very first time in their petition for certiorari. The Court should reject that attempt.

A. Petitioners Cannot Seek This Court's Review Of A Claim That Was Not Presented To Or Ruled On By The Court Below

Petitioners' case was one of four that was consolidated by the Puerto Rico Supreme Court for joint decision in a single opinion. All four suits asserted constitutional challenges to Act No. 7. While there was some overlap in the specific constitutional claims brought in the cases, each set of plaintiffs brought distinct claims and filed separate briefs in the Puerto Rico Supreme Court. The plaintiffs in one of the cases, CT-2009-6, asserted a Contract Clause claim in their complaint (App. 30a-31a) and briefed that claim in the Puerto Rico Supreme Court (App. 87a-88a). The plaintiff in another, CT-2009-9, also asserted a claim under the Contract Clause of the Puerto Rico Constitution in her complaint (App. 59a-62a), but never briefed that claim in the Puerto Rico Supreme Court. The plaintiffs in the other two cases, including petitioners here, neither asserted a Contract Clause claim in their complaints nor argued the issue in their merits briefing in the Puerto Rico Supreme Court.

The court below therefore assessed only whether the CT-2009-6 plaintiffs had suffered an unconstitutional impairment of Contract Clause rights. Pet. App. 93a-97a. The decision below is clear that the only Contract Clause claim being addressed is that brought by the unionized plaintiffs in case CT-2009-6 for alleged impairment of their collective bargaining agreement (*see id.* 93a), and the only contractual right that the court ruled was affected by Act No. 7 (though not unconstitutionally so) was the right of the plaintiffs in CT-

2009-6 to have layoffs conducted only in accordance with procedures set forth in that collective bargaining agreement. *Id.* 94a. None of the plaintiffs in the other three cases ever alleged or argued that they were covered by this collective bargaining agreement. The Puerto Rico Supreme Court did not conclude that any other contractual right was affected by Act No. 7. *Id.* 93a-97a.

In their brief to the Puerto Rico Supreme Court, petitioners did make a passing statement in a factual discussion to the effect that "[t]he law certainly cannot exclude" provisions in the U.S. and Puerto Rico Constitutions "regarding due process and the impairment of contractual obligations." Pet. App. 863a. Petitioners included a similar statement—referring only to Puerto Rico's Constitution—in their motion seeking provisional measures in aid of jurisdiction. *Id.* 728a. The Puerto Rico Supreme Court understandably did not treat those oblique references as sufficient to present a claim that had to be addressed. *Id.* 93a-97a.

Petitioners' failure even to argue a Contract Clause violation to the Puerto Rico Supreme Court precludes them from raising the claim in this Court. This Court ordinarily will not consider arguments that were not presented to the court below. *See Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2781 (2010); *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1473-1474 (2009). That practice is particularly appropriate here because after the Puerto Rico Supreme Court issued its decision, petitioners moved for reconsideration. Pet. App. 1059a-1090a. Although petitioners alleged in their motion that the Puerto Rico Supreme Court had committed numerous errors, they never suggested that one of them was a failure to address whether they had al-

leged a valid claim under the Contract Clause. *Id.* 1059a-1080a.

To the extent that they seek review of the Puerto Rico Supreme Court's disposition of the Contract Clause claim separately brought by the unionized plaintiffs in CT-2009-6, the petitioners here lack standing. Petitioners have never claimed to be covered by the collective bargaining agreement at issue in CT-2009-6—and they are not. Pet. App. 433a-467a. Even if they were, petitioners could not now adopt the CT-2009-6 plaintiffs' Contract Clause claim as their own.

B. Petitioners' Failure To Plead An Impaired Contract Defeats Any Contract Clause Claim They Might Have

Petitioners' complaint never identifies what specific contractual right they enjoyed before adoption of Act No. 7 that was impaired by that Law. Although petitioners complain that Act No. 7 deviates from the principle that personnel decisions be made on the basis of merit, they never explain how they might have a *contractual* right for layoff decisions to be made on this basis.

Petitioners' failure to identify with specificity the contractual right purportedly impaired by Act No. 7 precludes any intelligent evaluation of their Contract Clause claim. The degree of scrutiny to which a contractual impairment is subjected hinges on the severity of the impairment. *See Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *see also Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 245 (1978) ("The severity of the impairment measures the height of the hurdle the state legislation must clear."). This Court has explained that, in considering the permissibility of an impairment, courts should look

at whether the legislature "impose[d] a drastic impairment when an evident and more moderate course would serve its purpose equally well," and whether imposition of the impairment was unreasonable "in light of the surrounding circumstances." *United States Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1, 31 (1977). Even if this Court were inclined to overlook petitioners' failure to preserve their constitutional claim below, petitioners' failure to articulate in their petition to this Court precisely how the challenged legislation had "the effect of impairing a contractual obligation," *id.* at 17, makes it impossible for this Court to calibrate the "level of scrutiny" to the "severity of the impairment," as required by *Energy Reserves Group*, 459 U.S. at 411.

II. This Case Does Not Present Any Question Under the Contract Clause That Warrants This Court's Review

Even if this Court were to overlook the severe problems with petitioners' presentation of their constitutional claim, it should deny review. Petitioners argue that the decision below is incorrect under *United States Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1 (1977). Petitioners also allege that the decision conflicts with the decisions of the Fifth, Sixth, and Ninth Circuits, and that there is a split of authority on the degree of deference to be accorded legislative assessments of the reasonableness and necessity of the measures adopted. Neither argument has merit. In rejecting the Contract Clause claims made by other plaintiffs, the Supreme

Court of Puerto Rico properly applied the well-settled standards applicable to such claims.[8]

A. The Decision Below Does Not Conflict With This Court's Precedent

The Supreme Court of Puerto Rico faithfully followed this Court's precedent in determining whether the Commonwealth had demonstrated the existence of an important public purpose for, and the reasonableness and necessity of, the challenged action. Petitioners argue that this Court has further established that a plaintiff challenging the purported impairment of a contract has the right to a "hearing" to "rebut the state's allegations" as to the reasonableness and necessity of an alleged contractual impairment as a matter of law. Pet. i. This Court has never so held.

In *United States Trust*, this Court held that, where the impairment of a public contract is substantial, the State must demonstrate that the challenged action is reasonable and necessary. 431 U.S. at 22, 25. A State can justify a substantial impairment of a public contract with a "significant and legitimate public purpose ...

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[8] This Court has never decided whether the Contract Clause of the United States Constitution (which applies to the States, but not the federal government) applies to Puerto Rico. The First Circuit has applied the Contract Clause to Puerto Rico. *See Mercado Boneta* v. *Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 18 (1st Cir. 1997) (statute that abrogated the insurer did not violate the Contract Clause). The Supreme Court of Puerto Rico has likewise indicated that it believes the Contract Clause applies to Puerto Rico. *See* Pet. App. 85a; *Bayron Toro* v. *Serra*, 19 P.R. Offic. Trans. 646, 661 (1987). The Puerto Rico Constitution has an analogous clause in its Bill of Rights. P.R. Const. art. II, § 7.

such as the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 411-412. The problem need not be "an emergency," but the requirement that the problem be "broad and general" ensures "that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412.[9] The Court has also held that when a plaintiff challenges the alleged impairment of a contract to which the government is a party—unlike the impairment of purely private contracts—courts should not grant "complete deference" to legislative assessments of reasonableness and necessity. *United States Trust*, 431 U.S. at 26; *see Allied Structural Steel*, 438 U.S. at 244 n.15 ("[I]mpairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties."). The legislature may not (1) "consider impairing the ... contracts on a par with other policy alternatives," (2) "impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," or (3) act unreasonably "in light of the surrounding circumstances." *United States Trust*, 431 U.S. at 30-31.

The decision of the Supreme Court of Puerto Rico is entirely in accord with those principles. Citing this Court's decisions in *United States Trust* and *Energy*

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[9] The Supreme Court has defined "police power" for Contract Clause purposes "as an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people." *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905); *see also Veix* v. *Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38-39 (1940) (The state's "paramount authority ... is not limited to health, morals and safety. It extends to economic needs as well." (footnote omitted)).

Reserves Group, the court stated that the "guarantee against the impairment of contractual obligations limits the government's power to interfere with contractual obligations," and that, in the case of public contracts, "judicial scrutiny must be more careful to ensure that the state action is not only for its own benefit." Pet. App. 85a-86a (internal quotation marks omitted).

After concluding that Act No. 7 impaired the relevant collective bargaining agreement because the Act determines layoff eligibility by seniority rather than by the contractually established "merit principle" (Pet. App. 93a-94a), the court examined whether the Commonwealth had advanced an important interest and whether the imposition of the "criterion of seniority" was reasonable and necessary to advance that interest (*id.* 94a-95a). Quoting at length from the "Statement of Motives," the court determined that the legislature's decision to lay off employees strictly by seniority was appropriately responsive to the "fiscal emergency that threatens the socioeconomic welfare" of the Commonwealth. *Id.* 96a. The existence of that "state of emergency," the court noted, was "not based on ... mere speculation without foundation, but on authoritative sources" from throughout the Executive. *Id.* 62a.

The court further concluded that the seniority criterion applied by Act No. 7 was appropriate because it "ensure[d] fair application ... through the whole government" and it aided the Commonwealth in quickly and decisively reducing its public workforce. Pet. App. 95a. And the court found that the Commonwealth had demonstrated that none of the other "alternatives typically used as steps preceding the reduction of personnel" was "viable within the context of the magnitude of the Government's structural deficit." *Id.* 96a. Indeed, the court recognized that "[t]o address this crisis, the

State [had taken] a number of steps"—revenue-raising measures, cutbacks, and financing measures—"to bring real and substantial savings into government coffers." *Id.* 95a; *see id.* 55a-59a. Given the extensive justifications detailed by the legislature and the omnibus character of the law, the court determined that it was "entirely reasonable and necessary for the legislat[ure] to establish an objective criterion as is seniority in the workplace." *Id.* 97a.

Petitioners argue that the Puerto Rico Supreme Court "failed to comply with the requirements set in this Court's cited precedents" when it "took the [Commonwealth's] allegations at their face value, without requiring ... proof" of their veracity. Pet. 17, 20. *United States Trust* institutes no such evidentiary requirement. Rather, *United States Trust* instructs courts to ensure that "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." 431 U.S. at 22. Nothing in *United States Trust* or any other case decided by this Court requires a State defending against a Contract Clause challenge to produce "proof" of its sincerity or to validate its legislative findings through independent evidence. Put differently, this Court has never held that cases involving public contracts are precluded from dismissal as a matter of law. Where, as here, the law itself and the legislative history convincingly establish the reasonableness and necessity of the legislature's course of action, a reviewing court may resolve the Contract Clause claim as a matter of law without requiring the State to prove at a trial that its legislation was necessary to forestall a fiscal catastrophe.

B. The Decision Of The Puerto Rico Supreme Court Does Not Conflict With Other Appellate Decisions

Petitioners argue that the decision below conflicts with decisions of the Fifth, Sixth, and Ninth Circuits. No such conflict exists. There is no disagreement between the Puerto Rico Supreme Court and those courts of appeals as to the fundamental legal standards for evaluating claims that a State has impermissibly impaired a public contract.

The courts agree that (1) the State must demonstrate that the challenged action is reasonable and necessary to serve an important public purpose, and (2) courts must scrutinize the State's demonstration because complete deference to that assessment where the State's self-interest is at stake is inappropriate. The Puerto Rico Supreme Court so recognized. *See* Pet. App. 85a-87a, 90a-91a. The Fifth, Sixth, and Ninth Circuits have applied the same framework. *See United HealthCare Ins. Co.* v. *Davis*, 602 F.3d 618, 627 (5th Cir. 2010); *Toledo Area AFL-CIO Council* v. *Pizza*, 154 F.3d 307, 323 (6th Cir. 1998); *Southern Cal. Gas Co.* v. *City of Santa Ana*, 336 F.3d 885, 894 (9th Cir. 2003); *University of Haw. Prof'l Assembly* v. *Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999); *Nevada Employees Ass'n* v. *Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990). Other courts of appeals have agreed that courts "accord[] the legislature some deference but without accepting its assertions uncritically." *Baltimore Teachers Union* v. *Mayor & City Council of Balt.*, 6 F.3d 1012, 1022 (4th Cir. 1993); *see Mercado-Boneta* v. *Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 13, 15 (1st Cir. 1997) ("Although deference is due to the legislature, and weight is given to the legislature's own statement of purposes for the law, a court must ... consider

whether the proposed justification in fact serves *public* interests and whether its mechanisms to serve those interests reflect *reasonable* and *necessary* choices." (emphasis in original)); *Local Div. 589, Amalgamated Transit Union* v. *Massachusetts*, 666 F.2d 618, 643 (1st Cir. 1981) (Breyer, J.) ("[s]ome deference to the legislature's judgment is surely called for").

1. Petitioners argue that decisions in the Fifth, Sixth, and Ninth Circuits establish that the State must "provide proof" beyond the "pure allegations" of reasonableness and necessity contained in the legislation and legislative record. Pet. 18, 23. No court of appeals has recognized this supposed evidentiary requirement.

Petitioners cite the Sixth Circuit's decision in *Toledo Area AFL-CIO Council* as one of their examples-in-chief, but that case lends them no support. The Sixth Circuit stated in that case that, in considering whether "it is necessary and reasonable for the state to terminate the right to [wage] checkoffs in pre-existing" collective bargaining agreements, the State was not entitled to "the benefit of the courts' imagination," as would be the case under rational-basis review. 154 F.3d at 325 & n.12. Rather, the court stated that it would "consider only those [motivations] that [the State] assert[s]." *Id.* at 325 n.12. The court then concluded that the State had failed to demonstrate reasonableness and necessity because it had merely "posit[ed]" its justifications "*post hoc*" in the course of litigation. *Id.* at 325. The court stressed that the challenged act in that case had no legislative history or statement of purpose, and therefore the court had "absolutely no basis for determining why this law was enacted beyond the four *post hoc* justifications asserted by the state." *Id.*

This case presents none of the circumstances that led the Sixth Circuit to reject the State's justification in *Toledo Area AFL CIO Council*. The court below had no occasion here to "imagine" the justifications offered by the government of Puerto Rico. The legislature's "Statement of Motives" (Pet. App. 295a-324a) painstakingly details the historical roots of the structural deficit, the depth of the fiscal crisis, the governmental response to date, the dire consequences of inaction, and the legislature's assessment of the alternatives. The court's opinion discussed the legislation and its justifications at length, and concluded that the Commonwealth had "demonstrated through the facts and data that arise from the [legislation itself] that the measures contested were reasonable and necessary." Pet. App. 247a (particular vote); *see also id.* 266a ("We take judicial notice of the multiple legislative findings which establish the existence of a profound ... fiscal and budgetary crisis which dates back to several years.").

The Fifth Circuit's decision in *United HealthCare Ins. Co.* v. *Davis*, 602 F.3d 618 (5th Cir. 2010), which petitioners cite as being in "direct conflict" with the decision in this case (Pet. 24) is no different. In *United HealthCare*, the court examined whether a Louisiana statute impermissibly impaired the State's obligations under its contracts with two private health insurers. The court determined whether the State had articulated a significant and legitimate public purpose (resolved against the State) solely by referring to "the face of the Act, the events surrounding its enactment, and from [the Act's] effect." 602 F.3d at 631. After noting that the plain terms of the Act "appl[y] only to a narrow class of HMOs," explaining the particular events to which the Act was a response, and observing that the legislature had not "articulated a statement of

public policy," the court concluded that the State had not met its burden of showing that it was engaged in anything other than economic protectionism. *Id.* at 631 (internal quotation marks omitted); *see also id.* ("the Act is narrowly focused on benefitting in-state HMOs (indeed, a specific one) and is not a broad exercise of the State's police power").

Other courts of appeals have similarly decided Contract Clause challenges based on the face of the law and the related materials of which courts can take judicial notice, without requiring (or resorting to) additional evidence from the State. *See Mercado-Boneta* v. *Admin. del Fondo de Compensacion al Paciente*, 125 F.3d 9, 14 (1st Cir. 1997) (citing extensively from the legislation's "Statement of Motives" and finding that "[t]he Commonwealth's interests are revealed by the statutory scheme"); *Equipment Mfrs. Inst.* v. *Janklow*, 300 F.3d 842, 860 (8th Cir. 2002) (emphasizing the lack of a "statement of legislative intent or any other legislative history" from which the court could "directly ascertain the purpose" of the challenged legislation and going on to reject the State's "*post hoc* rationalization").

Petitioners' reliance on Ninth Circuit decisions is no more persuasive. In *Southern California Gas Co.*, that court concluded that a "trench cut" ordinance substantially impaired a right-to-repair proviso of an agreement between the City and a gas company. 336 F.3d 885, 892-893 (9th Cir. 2003). On a summary judgment record, the court ruled that the City had failed to demonstrate the reasonableness and necessity of the impairment because its "extent ... is not warranted by [the] stated goals" and the City had "failed to explain ... why impairment is necessary in this case." *Id.* at 896, 897. Nowhere did the court rule (as petitioners here argue) that laws impairing contracts may be up-

held only if they are supported by independent "proof." Likewise, in *University of Hawaii Professional Assembly* v. *Cayetano*, 183 F.3d 1096 (9th Cir. 1999), the court affirmed the entry of a preliminary injunction, citing to nothing more than the relevant legal standards and its own scrutiny of each party's assertions. Similarly, in *Nevada Employees Ass'n* v. *Keating*, 903 F.2d 1223 (9th Cir. 1990), the court concluded that the State had not addressed the alternatives plaintiffs had proposed and that the legislative record revealed that one appellee had "testified before the Nevada legislature that the [impairment at issue] was not necessary to fund [the important public benefit]." *Id.* at 1228.

None of these Ninth Circuit cases suggests any conflict as to the "evidentiary requirements in public contracts cases." Pet. 27. Rather, the courts uniformly examine the face of the law and the related materials of which courts can take judicial notice to determine whether the State has demonstrated that the impairment of contractual obligations was "reasonable and necessary to serve an important public purpose." *United States Trust*, 431 U.S. at 25. The Puerto Rico Supreme Court did exactly that in this case.

2. Nor is this Court's review warranted based on petitioners' contention that the courts of appeals are split on the degree of deference to be accorded to legislative determinations of the reasonableness and necessity of the measures adopted. Pet. 29. Specifically, petitioners compare the Fourth Circuit's decision in *Baltimore Teachers Union* with the Second Circuit's decision in *Association of Surrogates* v. *New York*, 940 F.2d 766 (2d Cir. 1991). Petitioners assert that in *Baltimore Teachers Union*, the Fourth Circuit "show[ed] almost total deference to the legislature" by "refus[ing] to ponder the availability of alternatives" to the contrac-

tual impairment, but that in *Association of Surrogates*, the Second Circuit invalidated the challenged provisions because, it concluded, "there were alternatives available to the state to advance its asserted public purpose." Pet. 29-30.

Even if the Second and Fourth Circuits might have diverged somewhat in those decisions on the degree of credit they accorded to the legislature's evaluations of the availability of alternatives, that could not provide a basis for review of *this* case, which arises from neither circuit. Indeed, petitioners do not even argue that the decision below conflicts with either the Second or the Fourth Circuit's decision on the deference issue. In any event, petitioners considerably overstate the distance between those two circuits' decisions, which reflect no more than a difference in judgment as to the appropriate outcome of particular cases under a settled legal standard. That is not a basis for review in this Court on certiorari. *See* S. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

APPENDIX

APPENDIX A

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT, SAN JUAN PART

904

KRISTY J. GONZALEZ BOU, [ET AL.]

PLAINTIFFS

VS.

COMMONWEALTH OF PUERTO RICO, MR. LUIS FORTUÑO, ESQ., DEPARTMENT OF CORRECTION AND REHABILITATION, ADMINISTRATION OF CORRECTION, CARLOS MOLINA RODRÍGUEZ, DEPARTMENT OF EDUCATION, CARLOS CHARDÓN, Fiscal Stabilization and Restructuring Board CONSTITUTED BY CARLOS GARCÍA, JOHN DOE, RICHARD DOE, JAMES DOE

DEFENDANTS

CIVIL NO.: *KPE09-4254*

RE:

PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY JUDGMENT ON UNCONSTITUTIONALITY OF LAW OF MARCH 9, 2009

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2009 OCT 13 AM 11:40[ill.]
[illegible scribble]

COMPLAINT

TO THE HONORABLE COURT:

COME NOW the plaintiffs, by and through the undersigned counsel, and very respectfully **state, allege** and **pray**:

I. JURISDICTION

[OMITTED]

[2]

II. DECISION FOR WHICH INTERVENTION IS SOUGHT UNCONSTITUTIONALITY OF LAW 7 OF MARCH 9, 2009

A. The plaintiff-employees were laid off under Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit," as amended,' without the due process afforded career public employees who have a property interest in their positions, a controversy detailed in the Constitution of the Commonwealth of Puerto Rico and reiterated by the case law of our highest court, the Supreme Court of Puerto Rico.

B. Nevertheless, the aforementioned Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal [3] Stabilization Plan to Save Puerto Rico's Credit" does not afford career employees the due process to which they are entitled as they hold a property right in their career positions. This statute is sacredly set forth in the Constitution of the Commonwealth of Puerto Rico and the Constitution of the United States of America.

C. In Section (b) (3) of Article 37.04:

"Layoffs of employees with permanent or career appointments shall be carried out exclusively pursuant to the criterion of seniority, so that employees with less seniority are laid off first."

This clause was completely disregarded. Moreover, the Fiscal Stabilization and Restructuring Board (JREF by its Spanish acronym) was vested with the power to determine the global amount of employees who would be laid off, pursuant to the provisions of Article 2 of the Law, a power which is entirely constitutional.

D. In the cases before us, the criterion of seniority was not implemented. Evidence of this is that neither the State itself, nor the Fiscal Stabilization and Restructuring Board (JREF) are able to explain the process that was carried out for the layoffs in the aforementioned [sic], and much less have they presented an organized plan that complies with the law to carry out this process.

E. The powers vested in this body, JREF, are powers contemplated in the Constitution and JREF does not have jurisdiction to exercise them. *Pagán Ramos v. FSE 129 DPR 888 (1992)" Baerga v. FSE 132 DPR 524 (1992)"*

[4]

E.[sic] The plaintiffs were not submitted to the criteria established in the Uniform Administrative Procedure Act, which guarantees that the agency must hold an administrative hearing, to which the employee must be summoned, and throughout which the employee has the right to be represented by

counsel. That is the reason why these dismissals are completely null.

F. The Fiscal Stabilization and Restructuring Board, better known as JREF, was created unconstitutionally, thus, it has no validity whatsoever in decision making.

G. Law 7, on its face, dismantles public agencies, depriving the people of Puerto Rico of essential services for their general subsistence. In the cases of the Administration of Correction, a security agency, they are destabilizing the system by dismissing civil employees who are the people in charge of each and every right of inmates in Puerto Rico.[iv]

H. As established by Demetrio Fernández Quiñonez:

> "*The Uniform Administrative Procedure Act expressly provides that an agency must follow a determined procedure when it has to conduct a formal adjudication. This includes the right to a hearing, notification of charges*[vi]*, presenting evidence*[vii]*, impartial adjudication*[viii]*, and a decision based on the record*[ix]*.*"

BRIEF STATEMENT OF FACTS

1. Mrs. Kristy J. González Bou held the career position of Supply Office Clerk I at the Guayama Commissariat Complex since 9/2/2004 under the Administration of Correction. On September 29, 2009, she was illegally laid off, without the due process afforded her as a career employee in the public [5] service, which she has been since 8/6/2002. She received a termination letter effective November 6, 2009. Mrs. González is currently three months

pregnant. The plaintiff's address is [REDACTED]. (Emphasis added)

2. Mr. Jesús Cora Romero received a termination letter on September 29, 2009, effective immediately. He was laid off illegally, without the due process afforded him as a career employee. Mr. Cora held a position as Administrative Assistant I at the Administration of Correction since 8/6/2002. Our client's address is: [REDACTED].

[Additional similar paragraphs omitted]

[11]

II. APPLICABLE LAW

1. Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit, Law No. 7 of March 9, 2009, as amended'

2. Chapter III, Section (f) of the Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit, Law No. 7 of March 9, 2009, as amended, describes the Fiscal Restructuring and Stabilization Board (JREF, by its Spanish acronym), created under Article 37.04 (5) of this Law, which was created to enforce the objectives of Chapter 3 of this Law and which was entrusted with taking any action necessary to comply with the law.[1]

3. The Federal Administrative Procedure Act provides the following with respect to these rights:

"Except as otherwise provided by statute, the proponent of a rule or ruler or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of police [sic] shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. A sanction may be imposed or rule or order issued except on consideration of the whole record or other parts thereof cited by a party and supported by and in accordance with that reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of [12] *Section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claim for money benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. 5 USC & 556 (D)."* [In English in original.]

2. [sic] PREAMBLE OF THE CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO

"We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves

and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America..

In so doing, we declare:

The democratic system is fundamental to the life of the Puerto Rican community;

[OMITTED]

[13]

a. CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO

Section 4. ARTICLE IV OF THE EXECUTIVE POWER

Section 1. The Governor

Powers and Duties of the Governor:

[OMITTED]

[14]

4. ARTICLE IX TRANSITORY PROVISIONS

Section 1. Continuation of Laws, Rights, Responsibilities, etc.

"When this Constitution goes into effect ***all laws not inconsistent therewith*** *shall continue in full force until amended or repealed, or until they expire by their own terms."*

"Unless otherwise provided by this Constitution, civil and criminal liabilities, rights, franchises, concessions, privileges, claims, actions, causes of action, contracts, and civil, criminal and administrative proceedings shall continue unaffected, notwithstanding the taking effect of this Constitution."

5. Constitutional Right—*Due Process of the Law, Properties and Rights that are Protected—Public Positions. The employees of the Puerto Rico Tourism Company, by adopting Personnel Regulations, 23 L.P.R.A., Section 671f, acquired a recognized property interest in their continued employment. Once this right was recognized, the State cannot deprive them of their right without certain procedural guarantees that meet due process.*

6. Section 7 of the Constitution of the Commonwealth of Puerto Rico establishes the Right to Life, liberty and the enjoyment of property; the death penalty shall not exist; due process; equal protection of the laws; impairment of contracts; property exempt from attachment.

"The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist. No person shall be deprived of his liberty or property without due process of law. No person in [15] *Puerto Rico shall be denied the equal protection of the laws. No laws impairing the obligation of contracts shall be enacted. A minimum amount of property and possessions shall be exempt from attachment as provided by law."*

Constitutional Guarantees—Protected Persons. The due process clause provides that certain substantive rights—life, liberty and property **cannot be taken**

away except in accordance with proper constitutional procedures.[xiii] [Emphasis added.]

6.[sic] Properties and Rights that are protected—Public Positions. Even if the Legislature can choose not to vest a property interest in public employment, **it cannot constitutionally authorize the deprivation of such interest, once it has been conferred, without proper procedural guarantees. (Emphasis added)**

7. The Public Service Personnel Act of Puerto Rico, 3 L.P.R.A., Section 1336(6)(b) and (c), allows the termination of public employees due to physical or mental disability, but it requires that prior to dismissing an employee on such grounds, the appointing authority must determine that the employee is physically and/or mentally unable to perform the duties of his/her position; or that he/she is incapacitated by a work-related accident and under medical treatment at the State Insurance Fund (Workmen's Comp) for more than twelve (12) months. It is implicit in these precepts that for the decision to be reasonable and judicially reviewable, it must be supported by determinations of the employee's physical or mental disability.[xiv]

8. Unless otherwise provided by this Constitution, civil and criminal liabilities, rights, franchises, concessions, privileges, claims, actions, causes of action, contracts, and civil, criminal and administrative proceedings shall continue unaffected, notwithstanding the taking effect of this Constitution.

[16]

9. In accordance with the provisions of the Claims and Complaints against the State Act, Law 104 of June 29,

1955, as amended, 32 L.P.R.A. Sections 3077[xv] and ss, which provides in its Article 2, Section (a):

"*Anyone who has some sort of a claim against the Commonwealth of Puerto Rico, ..., must present to the Secretary of Justice a written notification, clearly and concisely stating the date, place, cause and general nature of the damage suffered...*" and in Section (c) of this article, "*the aforementioned written notification shall be presented to the secretary of justice within 90 days from the date the claimant learned of the damages he/she is seeking.*" Such notification was done within the term in which the plaintiffs learned who had caused the alleged damage, because it was not until they conducted the pertinent investigation that they realized who was responsible. Pursuant to Article 1868 of the Puerto Rico Civil Code the prescriptive period is not only from the moment the aggrieved party knows of the damage, but also when the aggrieved party knows who caused the damage. Therefore, in the case before us it was not until the pertinent investigation was conducted that the plaintiffs realized that the State had been negligent. Such information is in public records that can be corroborated, since there is no risk that such evidence will disappear.[xvi]

According to the opinion issued by our highest court in Meléndez Gutiérrez v. ELA, 113 DPR 811 (1983[xvii]), if the information needed by the Commonwealth is in public records, and there is no risk that the evidence will disappear, there is just cause to exempt from the notification requirement, since such requirement is of strict compliance, not jurisdictional.[xviii]

10. As established by Raúl Serrano Geyls "*equal protection of the laws, the* [17] *formula of strict scruting,*

is used in two modes (1) when dealing with a "suspicious" classification; (2) when the law affects "fundamental" rights or interests.'"

Conclusion

Career public employees in Puerto Rico have a property interest in their job. Anytime a career public employee is terminated he/she must be guaranteed due process, including: an informal hearing that must be duly notified and held prior to termination, the course that will be carried out [sic] this hearing; an opportunity to answer the charges or accusations must be granted. This hearing must provide an opportunity for minimum initial scrutiny to determine whether there is just cause. Torres Solana v. PR Telephone 127 DPR 499 (1990),[xx] Torres Ponce v. Jiménez 113 DPR 58 (1982)[xxi]. This practice of strict scrutiny was used in several cases where fundamental civil rights were limited or violated. Skinner v. Oklahoma 316 U.S. 535 (1942)[xxii], Boddie v. Connecticut 401 U.S. 371 (1971)[xxiii]. In the present case, using strict scrutiny was indispensable since a fundamental right is clearly being infringed. In view of the foregoing, we believe that the Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit, Law No. 7 of March 9, 2009, as amended, is completely unconstitutional, and so is the Fiscal Stabilization and Restructuring Board (JREF), which was vested with powers that are not incumbent on this Board under the constitution.

PRAYER

[18]

WHEREFORE, plaintiffs respectfully pray that this Honorable Court:

(1) Annul the aforementioned terminations and reinstate the laid-off employees immediately.

(2) Find Law 7 unconstitutional.

(3) Declare the powers granted to the Fiscal Stabilization and Restructuring Board unconstitutional and completely null.

(4) Impose attorney's fees.

(5) And any other pronouncement the Court may deem proper under the law.

RESPECTFULLY SUBMITTED.

In Cayey for San Juan, Puerto Rico, on October 9, 2009.

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[Number at bottom of illegible stamp: 5246724]

[Handwritten number: *5246724*]

[Two (2), twenty dollar ($20.00) Commonwealth of Puerto Rico Internal Revenue Stamps with the following numbers at bottom: *C00677507* and *C00677506*, respectively.]

[illegible signature]
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[i] Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit"

[ii] Pagán Ramos v. FSE 129 DPR 888 (1992)

[iii] Baerga v. FSE 132 DPR 524 (1992)

[iv] 3 L.P.R.A & 2151 UNIFORM ADMINISTRATIVE PROCEDURE ACT

[v] Fernández Quiñones Demetrio, Administrative Law and the Uniform Administrative Procedure Act, Second Edition

[vi] 3 L.P.R.A & 2151 (A) 2154

[vii] Federal Administrative Procedure Act 5 USC & 556 (D)

[viii] Hernández Denton v. Quinones 102 DPR 218 (1974), Vélez Ruiz v. ELA 111 DPR 752 (1981)

[ix] 3 L.P.R.A & 2151 López v. Junta 80 DPR 646 (1958), FRIENDLY, SOME KIND OF HEARING 123 U. PA. L. REV 1267, 1268, 1273 (1975)

[x] Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit Law No. 7 of March 9, 2009, as amended

[xi] Chapter III Section (f) of the Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit Law No. 7 of March 9, 2009, as amended

[xii] Federal Administrative Procedure Act 5 USC & 556 (D)

[xiii] Constitution of the Commonwealth of Puerto Rico, SECTION 7

[xiv] The Public Service Personnel Act of Puerto Rico, 3 L.P.R.A. Section 1336 (6) (b) and (c)

[xv] The Claims and Complaints against the State Act, Law 104 of June 29, 1955, as amended, 32 L.P.R.A., Sections 3077

[xvi] Law 104 of June 29, 1955, as amended, 32 L.P.R.A., Sections 3077 and ss.

[xvii] Meléndez Gutiérrez v. ELA, 113 DPR 811 (1983)

[xviii] Meléndez Gutiérrez v. ELA, 113 DPR 811 (1983)

[xix] SERRANO GEYLS RAUL CONSTITUTIONAL LAW OF THE UNITED STATES AND PUERTO RICO VOLUME II (1989)

[xx] Torres Solano v. PR Telephone 127 DPR 499 (1990)

[xxi] Torres Ponce v. Jiménez 113 DPR 58 (1982)

[xxii] Skinner v. Oklahoma 316 U.S. 535 (1942)

[xxiii] Bodie v. Connecticut 401 U.S. 371 (1971)

CERTIFICATION OF TRANSLATION

I, Carol G. Terry, a US Court-Certified Interpreter, Certificate No. 03-001, and translator with an MA in Translation from the University of Puerto Rico, do hereby certify that, to the best of my knowledge and abilities, the foregoing is a true and correct translation of the original document in Spanish.

/s/

Carol G. Terry

[CERTIFIED TRANSLATION]

APPENDIX B

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SUPERIOR COURT, SAN JUAN PART

KRISTY J. GONZALEZ BOU [ET AL.]	CIVIL NO.: KPE 2009-4254 (904)
PLAINTIFFS	RE:
VS.	PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY JUDGMENT ON UNCONSTITUTIONALITY OF LAW 7 OF MARCH 9, 2009
COMMONWEALTH OF PUERTO RICO, HON. LUIS FORTUÑO, Governor of Puerto Rico	
DEFENDANTS	

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[2]

AMENDED COMPLAINT

TO THE HONORABLE COURT:

COME NOW the plaintiffs, by and through the undersigned counsel, and very respectfully **STATE, ALLEGE AND PRAY:**

FIRST: Pursuant to the provisions of Rule 3.4 of the Rules of Civil Procedure in effect and Article 5.003 of Law Number 201 of August 22, 2003, known as the "Commonwealth of Puerto Rico Judicature Act of 2003," this Honorable Court has jurisdiction over the subject matter of this action.

SECOND: Pursuant to Administrative Order number XVI of February first (1st), 1995, and Rule 21 of the Court of First Instance Rules of Administration of June 30, 1999, the addresses of the above-captioned plaintiffs are informed below:

[3]

[addresses REDACTED]

[6]

THIRD: The plaintiffs are career employees (permanent employees) from different agencies of the Commonwealth of Puerto Rico who were laid off under the [7] Layoff Plan set forth in Law Number 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit," as amended (hereinafter Law 7). Below is a list of the plaintiffs' circumstances of employment, as well as their dates of termination:

1. Mrs. Kristy J. González Bou was laid off on September 29, 2009, from her position as Supplies Office Clerk I at the Administration of Correction, where she has worked for over 5 years, illegally,

without the due process afforded those who hold a career position in the public service in Puerto Rico. She received a termination letter effective November 6, 2009. She is currently three-months **pregnant**. (Emphasis added)

[Additional similar paragraphs omitted]

[27]

FOURTH: The aforementioned layoffs were carried out in accordance with Article 37.04 (b) 3 of Law 7, which provides as follows in what is relevant hereto:

> *"Layoffs of employees with permanent or career appointments shall be carried out exclusively pursuant to the criterion of seniority, so that employees with less seniority are laid off first."*

FIFTH: The plaintiffs were stripped of their career or permanent positions without being guaranteed the due process of law irrefutably set forth and protected in Amendments V and XIV of the Constitution of the United States of America and Section 7 of Article 2 of the Constitution of the Commonwealth of Puerto Rico.

SIXTH: As described above, the plaintiffs received a written communication entitled "Certification of Date of Seniority in the Agency," hereinafter "the certification," prior to the termination letters. This communication does not constitute proper notification, which is a requirement of procedural due process when intervening or depriving public employees of their positions in which they have a property interest.

SEVENTH: As shown in the content of these communications, the Agency merely informs the employees of their starting date, and the amount of time they have worked as public employees. However, the employees are not informed of the evaluation criteria used for the dismissals by "seniority," nor did the content of the communication include the criteria used to compare the employees' seniority with that of others in the same position or post in the Agency. Therefore, it certainly does not constitute proper notification. That is, notification in this case was insufficient in accordance with the law.

[28]

EIGHTH: Furthermore, "the certification" does not advise the employees of their right to request judicial review.

NINTH: The content of "the certification" does not meet the minimum guarantees of procedural due process, recognized in the constitution, which require meeting the following requirements for the process to be fair and equitable and for it to, in turn, guarantee and respect the dignity of affected employees:

A. **Proper Notification of the Process**—As part of due process, public employees with a property interest in their positions have the right to be notified of the charges against them.

B. **An Informal Hearing to be Held Prior to Dismissal**—Employees must be given the opportunity to answer the charges against them.

C. **The Right to be Heard and to Present Evidence in one's Favor.**

TENTH: In the context of procedural due process, proper notification is an indispensable requirement for the procedure that is going to be used to be valid. Furthermore, the plaintiffs were not submitted to the criteria set forth in the Uniform Administrative Procedure Act, known as the LPAU, by its Spanish acronym, which guarantees that the agency must bring [sic]; a letter advising the employee of his/her right to request an administrative hearing, to which the employee must be summoned and throughout which the employee has the right to be represented by counsel. Therefore, these layoffs are completely null.

ELEVENTH: Consequently, the procedure established in Law 7 to implement the Layoff Plan is unconstitutional, as it fails to include the minimum constitutional guarantees of due process required when intending to deprive a person of a property right **[29]** such as in the case before us. The Law does not provide for proper and/or sufficient notification or an informal hearing prior to dismissing a public employee who has a property interest or right in his/her position.

TWELFTH: In this case it is alleged that constitutional rights of the plaintiffs have been violated, the Supreme Court of Puerto Rico has expressed in Pierson Muller I. v. Feijoó, 106 D.P.R. 838 (1978) that this is sufficient grounds to establish the existence of a "damage of patent intensity." Therefore, this Honorable Court has jurisdiction [sic] that allows the issuance of a provisional and/or permanent injunction.

THIRTEENTH:

RELIEF SOUGHT

A. As stated above, the plaintiffs were, under the authority of Law 7, stripped of their positions as career or permanent public employees with a property interest recognized in the Constitution of the United States of America and the Constitution of the Commonwealth of Puerto Rico. Plaintiffs very respectfully pray that this Honorable Court issue an Order to the pertinent agencies to annul the layoffs they were notified of. The Order sought is indispensable to avoid irreparable damage to the plaintiffs, who were capriciously and arbitrarily [sic] of a property interest or right, thus violating procedural due process. Furthermore, there is no appropriate remedy under the law, since this was done under Law 7, which expressly authorizes the layoff plan of career or permanent public employees. The plaintiffs are at risk of suffering irreparable damages, since, as of November 6, 2006, they will be stripped of their permanent positions and/or posts as public employees, which is their source of income to support themselves and their family.

[30]

Therefore, plaintiffs pray that this Honorable Court grant a preliminary and/or permanent injunction to maintain the plaintiffs in their positions in the agencies and prevent them from suffering considerable damage.

B. In accordance with Rule 59 of the Rules of Civil Procedure in effect, the plaintiffs very respectfully pray that this Honorable Court enter Declaratory Judgment, declaring the unconstitutionality of the pro-

cedure carried out to lay off these permanent public employees, which is set forth in Articles 37.04 (b) (3) and 37.04 (b) (4) of Law Number 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit," as amended, on the following grounds:

Due process requires that the State, when interfering with liberty and property interests of citizens, has the obligation to guarantee that this will be done through a fair and impartial procedure. Amendments V and XIV of the Constitution of the United States of America and Section 7 of Article II of the Constitution of the Commonwealth of Puerto Rico guarantee that no person shall be deprived of their liberty or property without due process of the law. The Fifth Amendment prohibits the State from depriving someone of their life, liberty or property without due process of law. Likewise, it protects individuals from the risk of double jeopardy, self-incrimination, and it prohibits the State from expropriating property unless it is for public use through fair compensation. Furthermore, it guarantees to citizens equal protection under the law and that their contractual obligations will not be impaired.

The first paragraph of Amendment XIV provides, among other things, "*...No state shall make or enforce any law which shall abridge the privileges or immunities of* [31] *Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*"

Article II, Section 7, of the Constitution of the Commonwealth of Puerto Rico provide that: "*The right to life, liberty and the enjoyment of property is recog-*

nized as a fundamental right of man. [...] No person shall be deprived of his liberty or property without due process of law."

Due process of law has two (2) different components: substantive and procedural. Substantive due process protects the rights and liberties that the Constitution of the Commonwealth of Puerto Rico and of the United States of America [sic] to citizens vis-à-vis the formulation of public policy by the State, both legislatively or by any other regulation enacted by the agencies of the Executive Power. That is, upon enacting laws or executing any action, the State cannot unreasonably, arbitrarily or capriciously affect property or liberty interests. *Pueblo v. Montero Luciano, 2006 J.T.S 167 (Rebollo López)*

Procedural due process requires that the State guarantee that any interference with the liberty and property interests of citizens be done through a fair and equitable procedure. *P.A.C. v. E.L.A., 150 D.P.R. 359.* Our highest court has expressed that *"procedural due process is not a rigorous mold that occurs abstractly, because its nature is imminently circumstantial and pragmatic, not dogmatic, each case requires a conscientious evaluation of the circumstances involved." Vélez Ramírez v. Romero Barceló, 112 D.P.R. 716 (1982).* The aforementioned protection is activated when there is an individual liberty or property interest. Once such protection is activated, the procedure to be followed is determined, jointly analyzing the government interests and [32] those of the affected individuals. *Nieves v. AM Contractors, Inc. 2005 J.T.S. 186 (Fiol Matta)*

In accordance with the constitutional guarantees mentioned above, for a judicial or administrative pro-

cedure to comply with due process, the following requirements must be met:

a. proper notification of the proceedings;

b. proceedings before an impartial judge;

c. the opportunity to be heard;

d. the right to cross-examine witnesses and examine the evidence presented against one;

e. being assisted by an attorney and for the decision to be based on the record.

Torres Ramos v. Policía de Puerto Rico, 143 D.P.R. 783 (1997); Rivera Rodríguez v. Lee Stowell, 132 D.P.R. 554 (1993). It is a fundamental principle of administrative law that the resolution or order issued by the agency must be based on the record of the particular case. Consequently, when the administrative decision is based on the record the parties are guaranteed the opportunity to refute the accuracy of the agency's decision. In order to determine whether a procedure meets the constitutional requirements of due process, we must analyze the following factors: *Municipio de San Juan v. Junta de Planificación, 2006 J.T.S. 164 (Rivera Pérez)*

1. the private interest that may be affected by the official action

2. the risk of an erroneous decision due to the process used and the probable value of additional or different guarantees

3. the protected government interest

[33]

Due process in administrative matters requires a fair and equitable proceedings that guarantee and re-

spect the dignity of the affected persons. *Magriz v. Empresas Nativas, 143 D.P.R. 63 (1997).* In this regard, public employees with a property interest in their position have the right to be given notice of the charges against them and to an informal hearing prior to termination. That is, it is required that employees be given the opportunity to answer the charges against them and that they be allowed to explain, either in person or in writing, the reasons why, according to them, they should not be laid off or terminated. The purpose of the informal hearing is to serve as minimum initial scrutiny to determine whether there is reasonable justification for the action [sic] is justified. In order to comply with due process, prior to laying off an employee who has a property interest in his/her position, the following must be guaranteed at the informal hearing: proper notification of the administrative charges against the employee; a description of the evidence the employer has; and an opportunity for the employee to be heard by the employer and/or to express his/her version of what has occurred. *Unión Independiente v. Autoridad de Edificios Públicos, 146 D.P.R. 633 (1998).* In this regard, notification is an indispensable requirement for an adjudicative process to be valid in its different stages, as the requirement to be heard implies having been notified. *Municipio de San Juan v. Junta de Planificación, supra.* Also see *Lupañez v. Secretario de Instrucción, 105 D.P.R. 696 (1977)*

C. That the layoffs be declared null because procedural due process was not applied.

D. That a reasonable amount of costs, expenses and attorneys' fees be imposed.

[34]

WHEREFORE, plaintiffs very respectfully pray that, after the pertinent legal proceedings, this Honorable Court Grant this Complaint, along with any other relief the Court may deem proper under the law.

En Cayey for San Juan, Puerto Rico, on October 21, 2009.

[illegible signature]
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[**Translator's Note:** This translated document consists of 34 letter-size pages, while the original document contains 33 legal-size pages.]

CERTIFICATION OF TRANSLATION

I, Carol G. Terry, a US-Court-Certified-Interpreter, Certificate No. 03-001, and translator with an MA in Translation from the University of Puerto Rico, do hereby certify that, to the best of my knowledge and abilities, the foregoing is a true and correct translation of the original document in Spanish.

/s/

Carol G. Terry

APPENDIX C

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
PONCE JUDICIAL CENTER
SUPERIOR PART

Courtroom 604

ZORAIDA MARTINEZ ROMAN, SAUDY LEILANY HERNANDEZ COLON and JESENIA AYALA MALDONADO Plaintiffs VS. COMMONWEALTH OF PUERTO RICO, FAMILY DEPARTMENT, CHILD SUPPORT ADMINISTRATION (A.S.U.M.E.) Defendants	CIVIL NO.: JPE2009-0788 RE: Preliminary, Permanent Injunction and Declaratory Judgment [partially legible ink stamp: PONCE CFI CIVIL FILINGS (ill.) OCT 21 AM 9:07]

COMPLAINT

TO THE HONORABLE COURT:

COME NOW the above-captioned plaintiffs, Mrs. Zoraida Martínez Roman, Mrs. Saudy Leilany Hernández Colón and Mrs. Jesenia Ayala Maldonado, by and through the undersigned counsel, and very respectfully STATE, ALLEGE and PRAY:

1. That plaintiff Zoraida Martínez Roman is of legal age, single, head of her family and an employee of the Child Support Administration (A.S.U.M.E., by its

Spanish acronym), a division of the Family Department. Her address is: [REDACTED] and her phone number is [REDACTED]. She began working for this government agency on June 2, 2003, when she was hired by the government administration in power at the time, which was controlled by the Popular Democratic Party (See Attachment I, Seniority Certification Letter).

2. That plaintiff Saudy Leilany Hernández Colón is of legal age, single, head of her family and an employee of the Child Support Administration (A.S.U.M.E., by its Spanish acronym), a division of the Family Department. Her address is: [REDACTED] and her phone number is [REDACTED]. She began working for this government agency on December 29, 1997, when she was hired by the government administration in power at the time, which was controlled by the New Progressive Party (See Attachment II, Seniority Certification Letter).

3. That plaintiff Jesenia Ayala Maldonado is of legal age, married and an employee of the Child Support Administration (A.S.U.M.E., by its Spanish acronym), a division of the Family Department. Her address is: [REDACTED] and her phone number is [REDACTED]. She began working for this government [2] agency on January 1, 2002, when she was hired by the government administration in power at the time, which was controlled by the Popular Democratic Party (See Attachment III, Seniority Certification Letter).

4. That the defendants, the Commonwealth of Puerto Rico, the Child Support Administration (A.S.U.M.E., by its Spanish acronym) and the Family

Department are entities with legal capacity to sue and be sued.

5. That the plaintiffs are all members in good standing of the *Unión de Servidores Públicos de Puerto Rico (SPPR/AFSCME)* [Union of Public Servants of Puerto Rico].

6. That between the plaintiffs and the defendants there is a work contract, as well as a collective bargaining agreement in effect since July 20, 2007, through to July 20, 2010. (See Attachment IV, Collective Bargaining Agreement).

7. That the executed contract and the collective bargaining agreement adopted and signed by the plaintiffs and the defendants are the law between the parties as they constitute a contract or contractual obligation assumed voluntarily by both parties to the contract, in compliance with all the essential legal requirements for persons who have the legal capacity to contract to execute a valid and binding contract, and the economic resources required to contract what is stipulated therein have been identified.

8. That the Legislative Assembly passed Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit," a statute which declares the existence of a fiscal crisis and, by decree, establishes that there is a fiscal emergency in the Commonwealth of Puerto Rico to justify, through this legislative decree, a layoff plan that is clearly unconstitutional, as it retroactively, in violation of the plaintiffs' due process, eliminates, suspends, restricts and abolishes acquired rights and

property interests that are protected under the constitution.

9. That the Legislative Assembly's action violated the separation of powers, and the Assembly exceeded its duties and powers when it passed a law establishing by decree that there is a fiscal emergency to legitimize the unconstitutional action of laying off employees without following the parameters required under the constitutional protections that recognize an employee's property interest in his job.

10. That Section 8 of Article 37.04 of Law 7 provides the procedure that the State is supposed to follow with respect to the certifications of seniority. The Law provides that the agencies certified in writing to each affected employee individually their date of seniority, according to their records. In the case of union employees who are members of a bargaining unit represented by a labor union, the union will also be notified. The certification will be sent to the [3] employees and, in addition, if applicable, to the labor union, by hand delivery or certified mail with return receipt, to the address found in the agencies' records, advising the employees of their right to state and support in writing their version of their seniority.

11. That in a letter dated April 14, 2009, the Administrator of the Child Support Administration (ASUME), Mr. Waddy Mercado Maldonado, Esq., notified the plaintiffs by hand delivery that the Agency for which they worked was certifying their employment seniority, in accordance with Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit," and

Circular Letter 2009-02 issued by the Fiscal Stabilization and Restructuring Board. (See Attachment I, II and II of the Complaint).

12. Subsequently, in a letter dated September 25, 2009, the Administrator of the Child Support Administration (ASUME), Mr. Waddy Mercado Maldonado, Esq. notified the plaintiffs by hand delivery that they were being **laid off** from their positions as of **November 6, 2009.** (See Attachment V, VI and VII of the Complaint). The notification of the layoffs, according to what is alleged in the letter that was hand delivered to the plaintiffs, was done in accordance with Law 7 and Circular Letter 2009-02 issued by the Fiscal Stabilization and Restructuring Board.

13. That the notification of the layoffs is against the collective bargaining agreement adopted and signed by the parties, which is legally binding as it is a contractual obligation, and it violates the union plaintiffs' due process.

14. That the notification of the layoffs, as stated in the letter hand delivered to the plaintiffs, is done in accordance with Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit."

15. That, in accordance with this disastrous Law 7, the property rights acquired by the plaintiffs are retroactively eliminated at a stroke, without safeguarding their procedural or substantive due process.

16. That tragic Law 7, in turn, annuls, suspends and eliminates the rights acquired by the plaintiffs, who are career employees and have a property right in their

jobs, and it eliminates rights acquired and negotiated collectively, impairing contractual obligations stemming from the work contract executed by them and the collective bargaining agreement approved and signed by the parties.

17. That the State, by passing Law 7, acted against its own promulgated acts and [4] laws, because after it recognized certain rights of the plaintiffs, by virtue of the collective bargaining agreement, approved under Law 45 of February 25, 1998, it legislated to eliminate, at one stroke, the property rights acquired by the plaintiffs, thus violating their due process and impairing contractual obligations acquired by the parties by virtue of the work contract executed by them and the collective bargaining agreement approved and in effect.

18. That the plaintiffs have an acquired property right in their jobs, which is recognized by the Constitution of the Commonwealth of Puerto Rico and the Constitution of the United States of America, Law 45 of February 25, 1998, the work contract executed and the collective bargaining agreement in effect between the parties since July 20, 2007.

19. That Law 7, used to lay off the plaintiffs, violates the merit principle recognized as a right acquired by them through collective negotiation, the collective bargaining agreement approved and Law 45 of February 25, 1998, laying off the plaintiffs based exclusively on criteria of seniority and not merit, as required by the case law of the Commonwealth of Puerto Rico Supreme Court and the United States Supreme Court, Law 45 of February 25, 1998, and the collective bargaining agreement in effect between the parties since July 20, 2007, and the work contract executed by the parties.

20. That the application and implementation of Law 7, by violating the merit principle recognized by other laws in effect and applying the exclusive criterion of seniority to carry out the layoffs, also violates the constitutional protection against discrimination on the basis of age, equal protection of the law and due process.

21. That the layoffs or dismissals of the plaintiffs are motivated by political discrimination, which violates their constitutional rights and constitutes a patently intense assault of their individual rights for which they claim urgent redress, this being a matter of a constitutional nature that is beyond the area of specialization of the Labor Relations Board and must be vindicated in Courts of Justice. *Pierson Muller I. v. Feijoó*, 106 D.P.R. 838, 846 (1978), *Pierson Muller II. v. Feijoó*, 108 D.P.R. 261 (1978).

22. That in accordance with the Civil Rights Act of Puerto Rico, the procedural mechanism on injunction is the proper procedure to vindicate rights protected by the Constitution of the Commonwealth of Puerto Rico and of the United States of America.

23. That Law 7 implements an improper, inoperable and inefficient procedural mechanism that violates the minimum guarantees required by due process and the other constitutional rights of the plaintiffs, as it is constituted in a dead end street where there is no use in resorting to an administrative venue to seek intervention in the exercise of its jurisdiction since **[5]** it is established *prima facie* and *ad initium* in the law itself that "no action carried out in accordance with its provisions, pursuant to what is stated in this law, shall constitute a violation of existing collective bargaining

agreements or a refusal to negotiate in good faith or an illegal practice," which constitutes an usurpation of the agency's and the courts' review function, as well as an advance adjudication of the controversies set forth in this complaint.

24. That due to the provisions of Law 7 and the manner in which it has been implemented against the plaintiffs, they have no choice but to turn to this Honorable Court to safeguard their rights.

25. That Law 7 is unconstitutional on its face, as it violates the due process of the plaintiffs and of every public employee who is subject to its provisions, as it strips them of their constitutional rights without safeguarding basic guarantees required by our code of law, as it interferes directly with property rights acquired by them. *Hernández Colón, Romero Barceló v. Policía de Puerto Rico, 2009 T.S.P.R. 154.*

26. That the defendants' actions have caused the plaintiffs irreparable damage, which can only be remedied by an effective use of Preliminary and Permanent Injunction, as they are being deprived of an acquired property right in their job, being discriminated against on the basis of age and political ideology. Furthermore, the State's action constitutes a deprivation of a right which they own by statute, a form of ownership recognized by the U.S. Supreme Court. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

27. That the State failed to meet the requirements of proper notification required under the collective bargaining agreement in effect between the parties and Law 7 itself.

28. That the State applied the unconstitutionality of Law 7 irrationally, arbitrarily and capriciously to lay off the plaintiffs, when it failed to follow the established procedure, which requires that the employees be informed of the decision to lay them off through the union.

29. That the omissions in the procedure are evident by simply contrasting what the law requires with respect to the certification of seniority and what was delivered to us, and that omission on its own, is sufficient for us to prevail in this action.

WHEREFORE, the plaintiffs very respectfully pray that this Honorable Court, after holding an urgent hearing, decree the unconstitutionality of Law 7 of March 9, 2009, known as the "Special Law Declaring State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save Puerto Rico's Credit," as well as its implementation and application. The plaintiffs further pray that this Honorable Court annul the entire procedure carried out by the State to notify the plaintiffs of their layoffs and the unconstitutional decision made by the Fiscal [6] Stabilization and Restructuring Board, the Child Support Administration (ASUME, by its Spanish acronym) and the Commonwealth of Puerto Rico with respect to same, and consequently GRANT this Complaint and Request for Preliminary and Permanent Injunction, issuing the pertinent order of stay, cease and desist, as well as any other pronouncement the Court may deem pertinent under the law.

In Adjuntas, Puerto Rico, on October 21, 2009.

[Two (2), twenty dollar ($20.00) Commonwealth of Puerto Rico Internal Revenue Stamps. Numbers at bottom of stamps: C00861443 and C00861444, respectively.] [One (1), one dollar ($1.00) Puerto Rico Bar Association Forensic Tax stamp.]	MALDONADO & RIVERA Attorneys—Notaries 6 Garzas Adjuntas, PR 00601 Telephone (787) 829-6487 Cell Phone (787) 562-7156 Fax (787) 829-0175 arceliomaldonado@netscape.net [illegible signature] ATTY. ARCELIO A. MALDONADO AVILES II BAR ASSOCIATION NO. 14969

[Translator's Note: This translated document consists in six (6) letter-size pages, while the original document consists in five (5) legal-size pages.]

CERTIFICATION OF TRANSLATION

I, Carol G. Terry, a US-Court-Certified-Interpreter, Certificate No. 03-001, and translator with an MA in Translation from the University of Puerto Rico, do hereby certify that, to the best of my knowledge and abilities, the foregoing is a true and correct translation of the original document in Spanish.

/s/

Carol G. Terry

[7]

OATH

We, Zoraida Martínez Román, of legal age, single, an employee and resident of Ponce, Puerto Rico, Saudy Leilany Hernández Colón, of legal age, single, an employee and resident of Ponce, Puerto Rico, and Jesenia Ayala Maldonado, of legal age, married, an employee and resident of Adjuntas, Puerto Rico, do hereby state the following under oath:

1. That are names and other personal information are as stated above.

2. That we are employees of the Child Support Administration assigned to the Family Department of the Commonwealth of Puerto Rico.

3. That we have read the foregoing Complaint and Request for Preliminary and Permanent Injunction and everything stated therein is true and correct, based on our personal knowledge. It was drafted pursuant to our instructions and information and to the best of our understanding it responds to the events in this case and contemplates proper relief.

4. That we sign this statement in support of the Complaint and Request for Preliminary and Permanent Injunction.

IN WITNESS WHEREOF, we swear to and sign this statement in Ponce, Puerto Rico, on October 21, 2009.

[Affiant's and notary's signature blocks omitted]

APPENDIX D

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN JUDICIAL CENTER
SUPERIOR PART SAN JUAN

ERIKA VISPO FIGUEROA, pro se, Plaintiff v. COMMONWEALTH OF PUERTO RICO; BOARD OF TAX RESTRUCTURING AND FISCAL STABILIZATION AND THE DEPARTMENT OF JUSTICE, Defendants	CIVIL NO.: KPE 09-4556 (904) RE: Preliminary, Permanent Injunction and Declaratory Judgment

MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

TO THE HONORABLE COURT:

COMES NOW plaintiff above, through the undersigned legal representation, and who before this Honorable Court STATES, ALLEGES and PRAYS:

I. JURISDICTION AND VENUE

[OMITTED]

[2]

II. PLAINTIFF

1. The residential and mailing address of plaintiffs herein is:

   a. ERIKA VISPO FIGUEROA

   [REDACTED]

   Tel. [REDACTED]

III. INTRODUCTION

1. On March 9, 2009, Act No. 7, as amended, was enacted known as the "Special Law Declaring a State of Fiscal Emergency and Establishing Comprehensive Fiscal Stabilization Plan to Save the Credit Rating of Puerto Rico." Said statute provides, among other things, an expense reduction plan composed of three phases to reduce the government payroll, which includes a Lay-Off Plan which is activated if the projected savings are not achieved.

2. By written communication dated September 25, 2009, and received on October 2, 2009, the employee plaintiff herein, of the Office of Compensation to Crime Victims assigned to the Department of Justice, was notified by the nominating authority that she would be laid-off from her career position.

3. In summary, said letter states that the lay-off is made pursuant to Act No. 7 of March 9, 2009, *supra*, and by order of seniority [3] established by the Restructuration and Fiscal Stabilization Board (JREF).

4. On July 10, 2009, Act No. 7 was amended by Act No. 37 of 2009 to, among other things, provide in Art. 37.02 a safeguard to the agencies

> and employees whose functions or work concerns **the security**, teaching, health and well-being in order to avoid that the services essential to the citizens are affected. At the time of drafting the article of the amendment the legislator made a sample list of positions or employees who would be excluded from the lay-offs provided under Act No. 7, this with a clear intention to ensure the rendering of essential services in the areas indicated. Specifically, it provided, as pertinent hereto that:
>
> **"In order to avoid a negative impact on the services offered by the Government,** and in compliance with Article 2 of this Act, the employees of the Agencies which according to their classifications carry out essential functions in the protection of the **security, teaching, health and well-being**, as these shall be defined by the JREF, **such as**: ... shall be exempt from the lay-offs of this law." (Emphasis provided)

It must be pointed out that by using the language of "*such as*," it is evident that the intention of the legislator was to establish some examples of those positions which must be considered to realize essential functions in the protection of the security, teaching, health and well-being. Said article can in no [4] way be interpreted as a limitative list. Had the latter been the legislative intention, the legislator would have expressly indicated that exempt from the application of the lay-offs are the only the following position.

[OMITTED]

[6]

10. The lay-offs shall go into effect on November 6, 2009, depriving the employees of their vested rights, without prior hearing, in violation of the due process of law which would make ineffective exhausting any administrative remedy before the patent damage of a constitutional nature caused to plaintiffs herein.

11. Pursuant to the above facts, and based on the grounds discussed below, we request this Honorable Court issue an Injunction and Declaratory Judgment, and consequently declare the provisions of Act No. 7 unconstitutional, and/or declare all notifications under said statute null, and leave without effect the notice received by the employee plaintiff herein.

IV. CONCURRENT JURISDICTION

[Omitted]

[14]

EXCLUSION FROM LAY-OFF OF EMPLOYEES WHO WORK IN SECURITY, TEACHING AND HEALTH AND WELL-BEING AREAS

[Omitted]

[16]

V. PETITION FOR PERMANENT INJUNCTION

[17]

The injunction remedy has the purpose to maintain the status quo until a trial is held to avoid that the conduct of the defendant produces a situation which makes the judgment finally issued moot, or which causes considerable damages to the petitioner for the duration of the litigation. Autoridad de Tierras de Puerto Rico v Moreno Ruiz Developer Corp. 2008 JTS 148.

[OMITTED]

[18]

In the case at bar, these criteria are fully complied and are sustained by the allegations. The granting of the injunction is legitimized based on the following grounds:

[19]

1. The principle of equity applicable to the granting or denial of the Injunction requires that the petitioner show the absence of an adequate remedy in law, that the administrative remedies constitute a futile and ineffective effort, or that they produce irreparable damage. [OMITTED]

2. Certainly, we are before a grievance of a constitutional nature which would be caused to plaintiff and the serious [20] damage if she is deprived of her means of support, without a due process of law. This being the case, this Honorable Court is the adequate forum to air the matters of law pertinent to the cause of action of plaintiffs. [OMITTED]

3. The State, the JREF or the Department of Justice shall not suffer any damage if the in-

junction is granted in favor of plaintiffs. [OMITTED]

[21]

4. The serious violations to the due process of law jump off the page and are shown with nothing further of the breach of JREF to harmonize the public policy of Act No. 7 of 2009 to alleviate the fiscal crisis without causing damage to the good operation of the government, in particular without affecting the areas which the legislator deemed as essential to protect: health, security, education and well-being. Likewise, the violation to the due process of law by depriving its employees of their proprietary right without holding not even an informal hearing, makes evident the high probability of plaintiff prevailing in the present case.

[22]

5. the impact on the public interest if the injunction is not granted is detrimental since what it concerns is the adverse effect on one of the responsibilities of the State to the citizens; the security and social well-being. The ministerial duty of the Department of Justice is to guarantee the public security of the country and to ensure that the crime victims are addressed and compensated adequately pursuant to Act No. 183 of July 29, 1998, as amended. To comply with this purpose of security and social well-being it is necessary to have available an Office Systems Technician. [OMITTED]

[23]

Having satisfied each and every one of the requisites for the granting of the injunction there proceeds that this Honorable Court issue the same and consequently immediately stay the lay-offs to be made in the Department of Justice to the plaintiff herein.

VI. Violation of the Due Process of Law in its Procedural and Substantive Phases by the Employer by Decreeing Layoffs Sheltered under the Provisions of Act No. 2

It should be pointed out that the legislature can opt for not grating a vested right in public employment, but it cannot constitutionally authorize the deprivation of that interests, once granted, without the proper procedural guarantees. Carrión Lamoutte v. Compañía de Turismo, 92 JTS 27, Vol. XV, p. 9306.

Vested rights are intangible. That is why not even the Legislature may enact a new law, nor can the Governor through an executive order lessen or ignore them. It is not the same with expectations, since they are probabilities or hopes that exist, that is why they can be reasonably modified. A vested right is incorporated within the property of the holder of a right and it is constitutionally protected in front of any governmental step that could intervene with the same. Hernández Colón v. Policia 2009 TSPR 154.

The due process of law clause constitutes the constitutional provision that guarantees the rights of the citizens in front of the possible unjustified interventions by the State. González Fuentes v. ELA 2006, TSPR 44.

[24]

The layoff actions performed did not comply with the legal and jurisprudential provisions in order to become effective and this constitutes a plunder of a constitutional right (vested right to the position as a career employee) in a crass violation of the due process of law. The Department of Justice never presented or notified to plaintiff the layoff plan, nor was there any notice or publication of the same (if it really existed before the implementation of the layoffs) to allow them to assess the criteria and procedures to perform said action. They were deprived, therefore, of the opportunity to reply or argue as to the Layoff Plan before enforcing the same.

De Department of Justice and the JREF violated Section 6.6(9) of the Human Resources Management for the Public Service Act, Act 184 of August 3, 2004, as amended, inasmuch they did not comply with making the layoff plan accessible to the employees to comply with Act 7 of 2009, nor did they exhaust the alternative provided by Act 184 before enforcing the layoffs. On this matter Act 184 provides that:

> "...
>
> Layoffs from the service, without constituting disciplinary or layoff actions could be decreed in the following circumstances:
>
> a. due to the elimination of position for lack of work or funds. In these cases, the layoffs shall be decreed within the groups of employees whose position have the same classification title and considering within each group the status of the employees, their productivity, habits and attitudes reflected in their assessments and their seniority in

the service. In order to determine seniority, any [25] service rendered in positions at agencies comprising the System shall be considered.

The Nominating Authority at each agency shall notify in writing each employee to be laid-off with at least thirty (30) days of notice from the date when the layoff would be effective. No layoff of employees shall be effective unless the notification requirement is fulfilled.

Each agency shall proceed to establish a written procedure in order to decree layoffs in the event they become necessary, the same shall be published or shall be available for the knowledge of any interested employee (Emphasis supplied)

Before decreeing the layoffs due to the elimination of position for lack of work or funds, all resources within the scope of the agency shall be exhausted so as to avoid said layoffs with actions such as:

1) Relocation of staff in positions of equal or similar classification in departments, offices or programs where there is any need for personnel.

2) Retraining of the employee to relocate it into another position when this could be reasonably done before the due date for such layoffs.

3) Enjoyment of accrued regular leave.

4) Un-paid leaves until the budgetary crisis passes, when the agency makes the decision due to temporary budgetary insufficiency that would not require the permanent elimination of the position. In such cases, it should be observed that the order of priority previously established in the layoff method shall be followed.

[26]

5) Reduction of the work schedule

6) Demotion of the employees, as last resource to avoid layoffs..."

On the other hand the Personnel Bylaws of the 2006 DEPARTMENT OF JUSTICE, following the provisions of Act No. 184, establishes in its Section 8.4 the following procedure as to layoffs in the public service:

[OMITTED]

[28]

Neither had plaintiff the opportunity of knowing the list of those laid-off by seniority prepared by the Department of Justice or the JREF to determine whether the application was fair and that the employer had not been selective protecting persons by considerations foreign to the causes that bring forth Act 7 of 2009. "A valid Act or governmental action on its face may result improper if applied in a discriminatory manner on a person, group of persons or sector of the community". In relation to this the Federal Supreme Court has stated that: **[29]** *"though the law itself be fair on its face and impartial in appearance, yet, if it is*

applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.. 136 (1886). Hdz v. Texas 347 U.S. 475 (1954).

In relation to this aspect, our Supreme Court has provided that a public employee, be it transitory, probationary or regular, cannot be laid-off by elimination of its position due to lack of work or funds, in the absence of the required layoff plan; the layoff without the mentioned plan tends to sustain any allegation with a discriminatory character as to the layoff. Pizarro et al v. Municipio de Carolina, 82 JTS 80, Vol. V, p. 2669.

The public agency contemplating the layoff of employee for lack of funds or work, must rigorously comply with the regulatory requirement of notification to the employee of the layoff plan, as well as the notification of the right to appeal. Olivieri Morales v. Pierluisi 83 JTS 12, Vol. VI, p. 3021.

In cases of layoffs due to lack of work or funds, the Personnel Act and its Regulation (Essential Areas of the Merit Principle sec. 93(1)), prescribes a method based on priority and the method to be adopted must be notified to the affected employees; it is established that the first employees to be laid off shall be the transitory employees, then the probationary employees and, lastly, the regular employees. It is further provided that in order to decree the order within **[30]** each group, the performance of duties shall be considered, and lacking valid information to assess that element,

the determining factor shall be seniority. Olivieri Morales v. Pierluisi, 83 JTS 13, Vol. VI p. 3021.

Pursuant to the Personnel Act and its Regulation, the layoff of public career employees for lack of funds, requires the prior adoption of a layoff plan, that would take into account the efficiency and time in public service, that should be notified to the employees; the laid off employees must be notified as to that effect with 30 days notice. Navedo et al v. Municipio de Barceloneta, 82 JTS Vol. VI, p. 2883-4.

Lacking valid information to determine the efficiency in the performance of duties done by public employees, the determining element in the layoff plan for lack of funds is the time in service (seniority); the person with the most recent appointment to the service shall be the first laid off. Calzada Quiñones v. D.A.C.O., 83 JTS 100, Vol. VII, p. 3370.

The due process of law of a public employee is violated when it is laid off—due to an alleged lack of work or funds—without complying with the Personnel Regulation when it provides that the method of layoff must be notified to the affected employee. Olivieri Morales v. Pierluisi, 83 JTS 12, Vol. VI, p. 3021.

Noncompliance with the objective criteria demanded by the Personnel Regulation and Act so as to validly implement layoffs for economic reasons tends to support an allegation of discriminatory layoff. Olivieri Morales v. Pierluisi, 83 JTS 12, Vol. VI, p. 3022.

[31]

The existence of a fiscal crisis does not automatically justify a layoff in public service for an alleged lack of funds; it is necessary that the nominating power de-

cree the layoff after faithfully followed the rules and steps established by the proper law and regulation. Calzada Quiñones v. D.A.C.O. 83 JTS 100, Vol. VII, p. 3370.

The actions by the Agency became, also, a violation of the Due Process of Law in its procedural phase because the letter notifying the layoff made the same effective as of November 6, 2006 without granting plaintiffs the holding of an informal hearing.

When an employee, or a public career employee is deprived of its salary, wages or employment, the State must establish some minimum guarantees to avoid the risk of an erroneous decision. The due process of law demands an informal hearing prior the layoff of the public employee when the law grant it a vested right on the position. This prior informal hearing reduces the risks of having a procedure of this kind erroneously depriving the employee of its vested right. Marrero Caratini v. Rodríguez Rodríguez, 95 JTS 44, vol. XVIII, p. 773.

On the other hand, before separating a public employee from its employment, or imposing a disciplinary measure he only thing required to comply with the due process of law is for the employee to be granted some kind of hearing in which it would have the opportunity of offering its version of the facts that motivated the employer's action. In summary, it is required that before the layoff of the employee, the nominating authority must so notify the charges [32] against the employee and its intention of layoffing it, and to grant the employee the opportunity of an informal hearing to present its version of the facts. In no way it has to be a

formal and elaborate hearing. The formality and the procedural requirements of the hearing shall depend on the importance of the interests at bar and of the nature of future procedures. It does not have to be a full evidentiary hearing, but rather something less. Nor it has to definitively resolve the propriety of the layoff, but rather serve as an initial verification that would avoid the making of erroneous decisions or determinations with a reasonable veracity as to the counts that shall support the layoff. After that informal hearing the layoff may be decreed, always subject to the holding of a later formal hearing that would comply with all the due process of law requirements. *See Cleveland Board of Education v. Loudermill, 40 U.S. 532 (1985), Torres Solano v. Puerto Rico Telephone Co., 90 JTS 122.*

Certainly it has been established that a public hearing does not have to be granted in all cases in which an administrative decision would be made. Mathews v. Eldrige, 434 U.S. 319 (1976). Nevertheless, for the assessment on what situations an administrative hearing is to be scheduled, the following elements should be taken into account:

a. The individual or private interests that shall be affected by the official action

b. The risk of an erroneous determination that would deprive the person of the protected asset through the [33] process used and the probable value of additional or different guarantees, and

c. The government interest protected with the summary action, including the possibility of using alternate methods pursuant to the duty at bar and the fiscal and adminis-

trative costs that would entail the imposition of additional guarantees.

Once it is determined under the state law that a public employee has a vested interest in a position, the due process of law clause of the Constitution of the United States demands the holding of an informal hearing before its layoff, unless under situations of significant risks for the government's interest in maintaining the employee in its position, in which case the course to follow would be the suspension of the employee with salary until the holding of the informal prior hearing. Torres Solano v. P.R. Telephone Co., 90 JTS 122, Vol. XIV, p. 8206.

In order to activate the protection offered by the due process of law in its procedural phase, there must exist an individual interest of freedom or property. Once the existence of a vested right or freedom is complied with, we must determine which is the procedure required. If the medulla characteristic is that the procedure must be a fair one, through the leading jurisprudence basic components of the due process of law have been identified, such as proper [34] notification and the opportunity for being heard and to defend itself. Pueblo v. Esquilín Maldonado, 2000 JTS 164, Vol. XXIV, p. 235.

In Carrión Lamoutte v. Compañía de Turismo 130 DPR 70 (1992) the Supreme Court provided that the employer does not comply with the requirements of the due process of law by layoffing an employee without a holding a prior hearing at some stage of the process.

Likewise, the Fifth Amendment of the Constitution of the United States provides that no one shall be deprived of its life, liberty or property without the due

process of law. On the other hand, the Fifteenth Amendment guarantees that same right when there are state actions involved. On this matter it provides and we quote: "Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

It is substantive phase, Act 7 of 2009 violates the due process of law inasmuch as it provides that the State, by enacting laws or by performing any action, cannot affect in a reasonable, arbitrary or whimsical manner the vested rights of any individual or group. Rodríguez Rodríguez v. ELA, 130 DPR 562 (1992); Rivera Santiago v. Secretario de Hacienda, 119 DPR 265 (1987).

[35]

The Supreme Court of the United States stated that the Constitution is the one that grants powers to the Legislative Assembly and that if any action by it was not in agreement with the Constitution, it would be acting outside of its authority, that is, performing an ultra vires action.

The Constitution of the United Sates in its Article V of the Bill of Rights establishes: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". In addition, in its Article 14 of the Bill of Rights it establishes: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

These amendments guarantee that no citizen shall be deprived of its property, among other things, without the due process of law. There is a vested right on the plaintiffs' employment, so that they cannot be deprived of the same [36] without the due process of law, just as established by the Constitution of the United States. The expression "due process of law" has been interpreted as the prohibition of having the states violating most of the guarantees set forth and protected by the Bill of Rights so that they would not be harmed in any way by the national government. It has also been interpreted that, on its own strength, it would protect other rights. The statement that no State can deny any person "the equal protection of the laws" has served as basis for many decisions of the Supreme Court in civil rights matters. Sobre Estados Unidos: La Constitución de los Estados Unidos de América con

notas explicativas adaptadas de The World Book Encyclopedia © 2004 World Book, Inc.

Through the American jurisprudence the afore mentioned amendments have been interpreted and the fundamental principle of the due process of law. In Atlantic Coast Line, R.R. v. Goldsboro, 232 U.S. 548 (1914) the Court stated: "It is settled [however] that neither the 'contract' clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community, that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property [or other vested] rights are held subject to its fair exercise. This statement by the Court has necessarily to be accompanied by with what was said in Liggett Co. v. Baldrige, 278 U.S. 105, 111, -12 (1928); Treugke v, Acme Homestead Ass'n. 297 U.S. 189, 197 (1936): "Insofar as the police [37] power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare". The Court established that at the time the State exercises its power to legislate, it cannot us mechanisms that would be arbitrary or obsessive; to the contrary, they must lead to the search of a substantial and real purpose that would be beneficial for the people. We have to bear in mind that while the government has the power to legislate and regulate the parameters within which we live, it has no faculties to exercise that

power in a capricious, unreasonable, arbitrary or oppressive manner.

In Goldberg v. Kelly, 397 U.S. 254 (March 23, 1970): "The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" Shapiro v. Thompson, 394 U.S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551 (1956) [n9]. The extent to which procedural due process [p263] must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that [38] loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Certainly the constitutional provisions are used by the State to impose restrictions; however, these restrictions come accompanied by diverse guarantees, such as the due process of law. It is worthy then to detail which is the State interest, the nature of the gov-

ernment's function, what is the restriction to be imposed, versus how the private citizen's right would be affected to see in turn what would be the damage, grievance or suffering that it would receive as a consequence. The layoffs performed by the State affect the health, safety and morale of the people to improve the economic situation of the country, but by implementing said program or legislation one right consecrated in the American Constitution, the due process of law, would be lacerated. The interests sought by the State is a worthy one, however, the mechanism to perform it is unconstitutional by being arbitrary, capricious and oppressive causing the public employee an irreparable and disproportionate damage compared to the benefit sought by the State. We are being deprived of our vested right on the employment without giving us the due process of law and in violation to the doctrine set forth by the Federal Supreme Court.

[39]

Let us examine in detail the case of Slochower v Board of Higher Education of New York City, 350 U.S. 551 (April 9, 1956) and we find: "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192. "The protection of the individual against arbitrary action" which Mr. Justice Cardozo character-

ized as the very essence of due process. Ohio Bell Telephone Company v. Commission, 301 U.S. 292, 302.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (June 29, 1992) Justice Brandeis is cited (joining Justice Holmes) when observing that: "*[d]*espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the States." The Court continues citing Whitney v. California, 274 U.S. 357, 373 (1927) where the Court stated: [T]he guaranties of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also **[40]** against arbitrary legislation." Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan J. dissenting form layoff on jurisdictional grounds) (quoting Hurtado v. California, 110 U.S. 516, 532, (1884)).

Over and over the Court has been clear in setting forth that the due process of law clause, guaranteed in the Fourteenth Amendment of the Bill of Rights of the American Constitution, provides for the State actions in the exercise of its power to regulate and legislate would not consist in arbitrary actions. In addition, the cases described above allow for a doctrine establishing that the due process of law applies to aspects of substantive law as well as in procedural aspects.

Home Building & Loan Assn. v. Blaisdell; 290 U.S. 398 (January 8, 1934) tells us: "Emergency does not

create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions [p426] which have always been, and always will be, the subject of close examination under our constitutional system. While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which [41] has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed".

The government has enacted Act 7 of 2009 based, among other things, on the fiscal emergency status in which the country presently finds itself, thus implementing a process of layoffs that violates the due process of law of every public employee. A state of the emergency does not increase the power to regulate of the State, nor does it diminish it, but also the restrictions set forth for the exercise of said power to regulate are not deteriorated nor do they disappear. Regardless of what the State determines it is an emergency, it is bound to comply with the constitutions guarantees given to us.

Faced with this, and on the grounds already stated above that the actions approved by the Legislature and which are being implemented at this time by layoffing public employees with career positions on which they had acquired a vested interest becomes a clear violation

of due process of law, jurisprudence and constitution of the Commonwealth of Puerto Rico, as well as that of the United States of America. Therefore, the action taken under the shelter of Act No. 7 that goes against the constitutional rights of herein plaintiffs employees, should be decreed null and void as well as ultra vires.

VII. On the unconstitutionality of Act 7 of 2009

Basis to hear as to the constitutionality of Act 7 of 2009.

Unconstitutional delegation of powers on the Executive Branch through JREF and the Governor on behalf of the Legislative Assembly.

[42]

[OMITTED]

[54]

Impairment of Contractual Obligations

The effects of Act 7 of 2009 get to such a degree that vacate and set aside the agreements negotiated and signed by the public employees through collective bargaining agreements, through their respective union representatives, as well as their respective employers (Agencies of the Central Government) pursuant to the provisions of Act 45, 1998, as amended. The collective [55] bargaining agreements constitute contracts with the force of laws and from that perspective the State cannot impair its provisions.

Art. II, Section 7 of the Constitution of the Commonwealth of Puerto Rico points out that the right to life, freedom and the pursue of happiness is acknowledged as a fundamental right of the Human Being... No person shall be deprived of its freedom or property

without a the due process of law, nor shall any person in Puerto Rico be denied the equal protection of laws."

No laws impairing contractual obligations shall be enacted.

Act 7 itself indicates that its provisions do not constitute impairment to contractual obligations because before the alleged fiscal crisis through which the country is going, the doctrine set forth by the Supreme Court in the case of Bayron Toro v. Serra, 119 DPR 605 (1987), should be applied.

In the case of Bayron Toro the Supreme Court decided that the modifications to the Regulation of the Retirement System of the University of Puerto Rico, approved by the Council of Higher Education on October 27, 1978, were reasonable and necessary changes **under the light of the circumstances of the case** (Emphasis supplied), directed to saving the actuarial solvency of the Retirement System, so there was no improper impairment of the contractual obligations.

The particular facts of the Bayron case maintain a fundamental difference from Act 7, 2009, as to the alternatives the State had before it before interfering with the constitutional rights of the affected persons and on the reasonability of [56] the application of the alternatives. The Bayron case was about the problems of economic solvency of the Retirement System and the difficulty that the precarious fiscal situation brought up to the system affecting the value of the assets of the System in the market, affecting the viability of the bonds investments becoming a palliative to avoid the debacle of the system. Faced with this situation, the Retirement System alternative was to increase the years in which the employees could become creditors of

their pensions by retirement so that the solvency of the system would not disappear with the detrimental effect of affecting all the employees contributing to the system. The medullar part of this action which the Court's reasoning approved when it determined that there was no impairment of contractual obligations is based on the fact that the State was not totally depriving the employees from receiving their contributions to the retirement, but that it delayed the year contractually foreseen as the only mechanism that it had available at the time to safeguard the solvency of the System. From that perspective the action by the Retirement System were some reasonable changes.

When we contrast the effects of the Act as to the layoffs and over the collective bargaining agreements, these are not reasonable actions to obtain the goal pretended in the Act. Such actions, in addition to affecting with vested rights to the degree of eliminating them (in the case of layoffs to deprive the employee from its employment) are not the only or necessary mechanism that the State has at its disposal to attend to a compelling interest. As we have indicated, the [57] Government has several alternatives that would contribute to lessen the economic crisis without the need to affect the vested rights of the employees or without the effect of impairing the contractual obligations. We acknowledge, nevertheless, that the vested rights could be waived and that the Government has the alternative of negotiating with labor unions so that in attention to the situation faced by the country, to consent that the negotiated economic clauses be vacated and set aside until a determined savings be set aside for a determined period of time. In the same manner the non-union em-

ployees could reach an agreement with the Government to consent with an equal action.

"When considering the validity of statutes under the impairment clause, the applicable criteria is that of reasonability. The function of the court consists in establishing a reasonable balance between the social interest of promoting the common good, also social, of protecting the contractual transactions against the arbitrary and unreasonable application of the laws". Warner Lambert Co. v. Tribunal, 101 DPR 378, p. 395 (1973). This clause limits the power of the State to interfere with the private contracting as well as with its own. Fletcher v. Peck, 6 Cranch 87, 137-139 (1810).

Based on the reasons stated above, we must conclude that Act 7, 2009, has provisions that violate the constitutional clause of separation of powers as well as the clear violation of the impairment of the contractual obligations and faced with this, the unconstitutionality of the statue must be decreed. Moreover, when the actions performed pursuant to Act No. 7 are not reasonable.

[58]

VIII. DECLARATORY JUDGMENT

[OMITTED]

[59]

Pursuant to the doctrine stated above and having shown that the grounds stated above deal on the unconstitutionality of the provisions of Act No. 7, the potential danger to which public employees are exposed of being deprived of their vested rights, the violations of the Due Process of Law and on the scope and inter-

pretation of Act No. 7, it behooves the judicial forum to interpret and define its scope and therefore this Honorable Court should issue a Declaratory Judgment.

IX. CONCLUSION

In the case at bar we are not before the interpretation of some statute or regulation that would require specialized knowledge of some administrative organism, we are before a controversy having to do strictly with a matter of law, interpretation and unconstitutionality of a law, which behooves only the judicial forum to decide.

Being the Injunction the most efficient instrument to vindicate the different constitutional rights protected by our Constitution. Noriega Rodríguez v. [60] Hernández Colón, supra, and the declaratory judgment the procedural vehicle that a plaintiff has to request the court to declare rights, statuses and other juridical relations even when there are other remedies, Moscoso v. Rivera, supra, pursuant to the jurisprudence stated above it is proper that this Honorable Court issue on behalf of party plaintiff the Injunction staying the layoffs and to issue a Declaratory Judgment decreeing the unconstitutionality of Act No. 7, and/or excluding the employees of the DEPARTMENT OF JUSTICE from being laid off being employees whose duties are essential to protect the security, health and welfare of the people.

> "The Judicial power has to decide what is the law and, as a consequence, to decide what are the provisions in conflict that should govern and that, therefore, the Judicial Power has to declare null

> and void any contrary provision to the Constitution because, otherwise, this document would be reduced to nothing, stop existing. Marbury v. Madison, I Cranch, 137."

IN WITNESS WHEREOF, we request very respectfully that this Honorable Court grant this petition for Injunction and Declaratory Judgment and as consequence to stay in a preliminary and permanent manner the layoffs by the Department of Justice; to declare null and void and ultra vires the actions performed by JREF and the Department of Justice; to declare the provisions of Act No. 7 to be unconstitutional and to issue any other pronouncement that would be proper in law.

[61]

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, today November 6, 2009.

(sgd.) ERIKA VISPO FIGUEROA
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APPENDIX E

COMMONWEALTH OF PUERTO RICO
SUPREME COURT OF PUERTO RICO

Zoraida Martínez Román, Saudy Leilany Hernández Colón, Jesenia Ayala Maldonado Respondents vs. Commonwealth of Puerto Rico Department of Family, and the Administration for Child Support Petitioners in Certification	Case no. TS: CT 2009-6 Case no. JPE 2009-0788 On: Preliminary and Permanent Injunction, and Declaratory Judgment *[Stamp: Nov. 9, 09, 4:09 p.m. Supreme Court of P.R. Received]*

RESPONDENT'S ALLEGATION

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RECEIVED NOV. 18 2009

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COMMONWEALTH OF PUERTO RICO
SUPREME COURT OF PUERTO RICO

Zoraida Martínez Román, Saudy Leilany Hernández Colón, Jesenia Ayala Maldonado Respondents vs. Commonwealth of Puerto Rico Department of the Family, and the Child Support Administration Petitioners in Certification	Case no. TS: CT 2009-6 Case no. JPE 2009-0788 On: Preliminary and Permanent Injunction, and Declaratory Judgment

ALLEGATION

In Germany the Nazis first persecuted the communists,
and I didn't speak up because I wasn't a communist.
Then they came after the Jews,
and I didn't speak up because I wasn't a Jew.
Then they came after the trade union members,
and I didn't speak up because I wasn't a trade union member.
Then they came after the Catholics,
and I didn't speak up because I was a Protestant.
Then they came after me—
and by that time no one was left to speak up.
Let's make sure such a thing never happens again.

Martin Niemöller

TO THE HONORABLE COURT:

The above-captioned plaintiffs-respondents, Mrs. Zoraida Martínez Roman, Saudy Leilany Hernández Colón y Jesenia Ayala Maldonado come now, through the attorney that subscribes, before this Honorable Court STATE, CLAIM AND PRAY:

I—JURISDICTION AND COMPETENCE

[OMITTED]

II—CASE TO WHICH THE CERTIFICATION REQUEST IS REFERRED

[OMITTED]

III—Statement of Procedural Facts

[OMITTED] The respondent party, the Commonwealth of Puerto Rico, the Child Support Administration (A.S.U.M.E.) and the Department of the Family are entities with legal capacity to sue and be sued. The plaintiffs are all bona fide union members from the Union of Public Servants of Puerto Rico (SPPR/AFSCME) (Spanish initials). Between the plaintiffs and the respondents there exists an employment contract, as well as a collective bargaining agreement, valid form July 20, 2007, through July 20, 2010.[5] The subscribed contract, as well as the collective bargaining agreement adopted and signed by the plaintiffs and the respondent parties, is the law between the parties by being a matter of a contract or contractual obligation, assumed voluntarily by both contracting parties, with all the essential elements that the law re-

[5] See: Addendum IV of the complaint, Collective Bargaining Agreement.

quires so that the persons with legal capacity to contract grant a valid and binding contract and, also having being identified the necessary financial resources to make that agreement. The Legislative Assembly approved Law No. 7, of March 9, 2009, known as the Special Law Declaring Fiscal Emergency and Establishing Complete Plan of Financial Stabilization to Save the Credit of Puerto Rico: a statute which legislates the existence of an alleged fiscal crisis and, by decree, establishes that there exists a fiscal emergency in the Commonwealth of Puerto Rico, to justify, through such legislative decree, a dismissal plan with clear overtones of unconstitutionality, in a retroactive manner, and violating due law process of the law of plaintiffs, eliminates, suspends, restricts and abolishes acquired rights and proprietary interests that have constitutional protection. The action of the Legislative Assembly breaches the separation of powers and it exceeds in its attributes and authority approving a law, in which it is established by decree that there is a fiscal emergency, with the purpose of legitimizing an unconstitutional action of employee dismissal without following the parameters required by the constitutional protection that acknowledges a proprietary interest of the employee over his/her employment. Law Num. 7 provides, in its article 37.04, clause 8, the procedure that the State is supposed to follow in relation to the seniority certifications. The Law provides that the agencies certified by letter, to its affected employees, individually their seniority date, as it arises from their records. In the case of employees' members of an appropriate unit represented by a trade union, it is established that it will be notified also to such trade union. Such certification will be notified to the employees, and also, if it were the case, to the trade union, hand delivered or by certified mail re-

ceipt requested, to the address that appears in the agencies' records, advising the employee of his/her right to state and support in writing his/her version as to his/her seniority and seniority date. In the letter dated April 14, 2009, the Administrator of the Child Support Administration (A.S.U.M.E.), Waddy Mercado Maldonado, Esq., notified by hand delivery to the plaintiffs that the Agency for which they work was certifying their seniority in the employment, according to Law Num. 7 of March 9, 2009 known as the Special Law Declaring Fiscal Emergency and Establishing Complete Plan of Financial Stabilization to Save the Credit of Puerto Rico and a Circular Letter 2009-02 issued by the Fiscal Restructuration and Stabilization Board.[6] Subsequently, in a letter dated September 25, 2009, the Child Support Administrator (A.S.U.M.E.), Waddy Mercado Maldonado, Esq., notified by hand delivery to the plaintiffs that they would become **unemployed** beginning **November 6, 2009**.[7] The dismissal notifications, as alleged in the hand delivered letter to plaintiffs, was made under the protection of Law No. 7 and Circular Letter 2009-02 issued by the Fiscal Restructuration and Stabilization Board. The dismissal notification is contrary to the collective bargaining agreement, adopted and signed by the parties, which has legal force being a contractual obligation and violates due process of the law of the union member plaintiffs. The notification of the plaintiffs, as it emerges from the hand delivered letter to the plaintiffs, is done under the protection of Law No. 7 of March 9, 2009 known as the Special Law Declaring Fiscal Emergency and Establishing

[6] See: Addendum I, II and III of the Complaint.

[7] See: Addendum V, VI and VII, dismissal letters.

Complete Plan of Financial Stabilization to Save the Credit of Puerto Rico. According to the infamous Law No. 7, retroactively are eliminated in a single stroke the proprietary rights acquired by the plaintiffs, without safeguarding due process of the law both substantive as well as procedural. Law 7 in turn, sets aside, suspends and eliminates rights acquired by plaintiffs who are career employees and have proprietary rights over their employment and also eliminates the acquired and collectively negotiated rights, impairing the contractual obligations that arise from the employment contract subscribed between them and the collective bargaining agreement approved and signed by the parties.

The State, approving Law No. 7, is acting contrary to its own promulgated actions and laws, for after having acknowledged rights to the plaintiffs by virtue of the collective bargaining agreement, approved under the protection of Law No. 45 of February 25, 1998, legislates to eliminate, all of the sudden, the proprietary rights acquired by the plaintiffs, breaching due process and impairing contractual obligations acquired by the parties, by virtue of the employment contract subscribed by the parties and the collective bargaining agreement approved and effective. The plaintiffs have an acquired proprietary right over their employment, acknowledged by the Constitution of the Commonwealth of Puerto Rico and the Constitution of the United States of America, Law No. 45 of February 25, 1998, the employment contract granted and the collective bargaining agreement, valid between the parties beginning July 20, 2007. Law No. 7, utilized for the dismissal of the plaintiffs, breaches the principle of merit, recognized as a right acquired by them through the collective bargaining, the approved collective bargaining agreement and Law No. 45 of February 25,

1998, 45 dismissing the plaintiffs based exclusively on seniority criteria and not on merit, how it is required by the jurisprudence of the Supreme Court of the Commonwealth of Puerto Rico and the Federal Supreme Court, Law No. 45 of February 25, 1998 and the collective bargaining agreement in effect between the parties beginning on July 20, 2007, and the employment contract granted by the parties. Likewise, the application and implementation of Law No. 7, upon violating the principle of merit recognized by other laws in effect and the application of the exclusive seniority criteria to carry out the dismissals, breaches the constitutional protection against discrimination by reason of age, equal protection of the law and due process. The dismissals or layoffs of the plaintiffs are motivated by reason of political discrimination, which makes vulnerable their constitutional rights and constitutes an aggravated act of patent intensity to their individual rights which require an urgent repair, being a matter of constitutional nature foreign to the specialized field of the Work Relations Commission and worthy of being vindicated by the Courts of Justice. Pierson Muller I v. Feijoo, 106 D.P.R. 838, 846 (1978), Pierson Mueller II v. Feijoo 108 D.P.R. 261 (1978). In accordance with the Civil Rights Law of Puerto Rico, the procedural mechanism of Injunction is the appropriate one to vindicate rights protected by the Constitution of the Commonwealth of Puerto Rico and the United States of America. Law No. 7 implements a procedural mechanism that is inadequate, inoperative and breaches the most minimum guarantees that require due process and the rest of the constitutional rights of the plaintiffs, for it constitutes an impasse to resort to the administrative forum to request its intervention in the exercise of its jurisdiction to the extent that *prima facie* and *ad*

initium it is established in the same law that "no action carried out pursuant to its provisions, according to what is indicated in this law, will constitute a violation to the existent collective bargaining agreements, or a denial to negotiate in good faith or a illicit practice, which constitutes a dispossession of the revising role of the agency and of the courts, as well as an advance adjudication of the presented controversies in the aforementioned complaint. Because of that provided in Law No. 7 and because of the way in which it has been implemented against the plaintiffs, there is no other remedy for them than to resort to the Honorable Court to safeguard their rights. Law No. 7 is unconstitutional at first hand, for it violates the due process of the plaintiffs and of any public employee against whom its provisions have been applied, depriving them of their constitutional rights without safeguarding the basic guarantees that required by our case law, for the directly interfere with their acquired proprietary rights. *Hernández Colon, Romero Barceló v. Policía de Puerto Rico, 2009 T.S.P.R. 154.* The actions of the respondents cause an irreparable damage, to the petitioners, which can only be remediated through the effective use of the Preliminary and Permanent Injunction, for they are being deprived of an acquired proprietary right, discriminating against them by reason of age and by reason of political beliefs. Also, the action of the State constitutes a deprivation over a right as statutory title holder, form of property acknowledged by the Federal Supreme Court. *Goldberg v. Kelly, 397 U.S. 254 (1970).* The State did not comply with the adequate notification which is required by collective bargaining agreement in

effect between the parties and Law Nu. 7.[8] The State applies the unconstitutional Law No. 7 in an irrational, arbitrary and capricious way to dismiss the plaintiffs, by not following the established procedure that requires that the dismissal decree be notified through the union. The omissions in the procedure emerge by only contrasting what the law requires concerning the seniority certifications and what was delivered to them, and this omission by itself, is sufficient to prevail in this complaint.

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[8] In this case the Commonwealth of Puerto Rico, has presented and reiterated specifically that it adequately notified to the union, which contrasts with what was expressed by such party before another judicial process celebrated by virtue of a complaint filed by the union in representation of its union members. It is required that there is judicial knowledge of case number KPE09 4465. United Public Servants of Puerto Rico, et al. vs. Commonwealth of Puerto Rico, et al., of the Court of First Instance of San Juan. In such case, it a judgment was entered by stipulation of the parties. In the referred judgment, it is constituted that: **"given that the E.L.A. acknowledges having notified the employees members of the Union the period of seniority and/or dismissals in a defective manner"** and for that reason **"such party declares having left without effect such notifications"** the court enters a voluntarily dismissal judgment without prejudice: (See Addendum:1)

Before this admission from the party, the respondents request de release from presenting evidence, over that admitted fact. Please observe, the double discourse articulated by the same party, the E.L.A., in two distinct judicial procedures. In the present case they maintain the obstinate posture of denying having incurred in the error of notifying the plaintiffs and Union deficiently, recurring to the euphemism that it is only about technicalities, in the other, they admit openly having made a defective notification. The double discourse, not only is contrary to the principle of good faith that should permeate the litigation, but also, censorable and immoral.

IV—BRIEF AND CONCISE OBSERVATION OF THE PRESENTED ISSUES:

THE CONSTITUTIONALITY OF CHAPTER III OF LAW NO.7 OF MARCH 9, 2009 FOR VIOLATING THE CONSTITUTIONAL CLAUSE THAT SAFEGUARDS THE LIFE, PROPERTY, DUE PROCESS OF THE LAW, EQUAL PROTECTION OF THE LAWS AND PROHIBITS IMPAIRMENT OF CONTRACTUAL OBLIGATIONS.

V—DISCUSSION OF THE PRESENTED ISSUES:

The Constitution of the Commonwealth of Puerto Rico, in its Article II, section 7, establishes clearly that:

> It is acknowledged as a fundamental right of the human being the right to life, freedom and the enjoyment of property. Death row will not exist. No person will be deprived of his/her freedom or property without due process, nor will anyone in Puerto Rico be denied equal protection of the laws. No laws will be approved that will impair contractual obligations. The laws will determine a minimum of property and possessions not subject to embargo.[9] (Emphasis ours).

This Supreme Court has interpreted in countless instances the constitutional clause of due process. To those effects it has been pointed out:

[OMITTED]

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[9] Constitution of the Commonwealth of Puerto Rico, Article II, Section 7.

About the constitutional clause relative to equal protection of the laws, this Supreme Court has expressed that:

[OMITTED]

This Court has recognized in turn as fundamental rights the right to work and the right to life and property. In this regard it was stated that:

> **Man's ambition to win the bread in one of the occupations that his country has to offer, is a constitutionally protected right by the terms of due process of law and equal protection of the laws.**[62] (Emphasis ours)
>
> **Our Constitution recognizes as fundamental human rights, the enjoyment of property and the right of a person to the protection of the law against all abusive attacks upon private and family life.**[63] (Emphasis ours)
>
> The enjoyment of the right of property involves the enjoyment of its economic value.[64]
>
> The Legislature may set limitations on the right of property for the benefit of the general welfare.[65]
>
> In relation to the contractual obligations undermining, the Court has determined that:
>
> The constitutional provision prohibiting impairment of contractual obligations does not prevent

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[62] Ortiz Cruz vs. Equestrian Board, 101 D.P.R. 791 (1973).

[63] Infante vs. Leith, 85 D.P.R. 26 (1962).

[64] Colón Vélez vs. Lebrón, 97 D.P.R. 154 (1969).

[65] E.L.A. vs. Márquez, 93 D.P.R. 393 (1966).

the State regulatory power for the benefit of the general public interest.[66]

Considering the validity of the statutes under the clause of impairment of contractual obligations the **applicable criteria is one of reasonableness.**[67] (Emphasis ours)

Reasonable and necessary changes in light of the circumstances of the moment, address to save the actuarial solvency of the Retirement System, do not constitute impairment of contractual obligations under the constitutional clause.[68]

In principle, the private contracting cannot prevent the exercise of the state police power.[69]

Under both, the guarantee of due process as well as under the guarantee against impairment of contractual obligations, the court must use the reasonableness criteria to determine the validity of any legislative action which aims to protect the social interest of the common good.[70]

Even when the Legislative Assembly has ample powers to approve reasonable measures with the purpose of safeguarding, regulating, the fundamental interests of the people and protect the common good, however, **said regulatory power, however broad is not unlimited and its exercise may**

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[66] Bayrón Toro vs. Serra, 119 D.P.R. 605 (1987).

[67] Ibid.

[68] Ibid.

[69] Warner Lambert Co. vs. Superior Court, 101 D.P.R. 378 (1973).

[70] Ibid.

never be arbitrary or unreasonable.[71] (Emphasis ours)

If **superior reasons of public order** exist, the protection of the contractual private relations in the legal system may end up subordinated to the state police power.[72] (Emphasis ours)

The **reasonableness criteria** is the one applicable by the court when considering the validity of the statutes under the clause against the undermining of the contractual obligations of our Constitution, it is the duty of the court to establish a **reasonable balance between the social interest**, of promoting the common good, and **the interest, also social, of protecting the contractual transactions against the arbitrary and unnecessary application of the law.**[73] (Emphasis ours)

The reasonability of a statute is determined under the clause against impairment of contractual obligations, taking in consideration, mainly, the **substantiality of the public interest** promoted by itself and the **dimension of the impairment caused by its retroactive application.**[74] (Emphasis ours)

When we encounter the situation where the state modifies its own obligations, the judicial scrutiny should be careful to ensure that the State's action is not only for its own benefit. In

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[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

> **these cases the modification besides being reasonable must also be necessary to advance some important governmental purpose. To asses a government obligation modification we must first determine if we are before a contractual obligation protected by the Constitution. Second, it is essential that the modification in effect, constitutes an impairment of the contractual obligation. If it arises as a consequence of a reasonable and necessary obligation, addressed to advance a public interest, we will sustain its validity.**[75]

[Quotations of Articles 34, 37.04, 38, and 46 OMITTED]

[OMITTED]

Finally, the legislature, provided in article 69 of Law 7, the non discretional authority granted by the Supreme Court to hear those cases in which the constitutionality of the law is attacked, or questioned in some way. Article 69 establishes that:

[OMITTED]

In this case, it is essential to point out that contrary to the position established by the State, it not a matter of merely applying the law, because the law is not applied in a vacuum. Law requires some facts, that is to say, there has to be a factual situation that serves as a basis to be able to apply a norm. As this court knows, in the case at bar, the plaintiffs were not even allowed to present evidence to sustain their allegations, therefore, the only thing that this court has before it, is the complaint filed, as well as some interlocutory motions

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[75] Bayrón Toro vs. Serra, 119 D.P.R. 605 (1987)

filed by the state, one requesting the transfer of the case and another asking for the stay of proceedings inasmuch as a certification appeal had been filed before this court. The State, despite the fact that a term was granted by the Court of First Instance, did not file a reply to the complaint. For such reason, we do not have a preliminary state as to what is the position of the Commonwealth of Puerto Rico concerning the allegations of the complaint. What we do know is that the Commonwealth of Puerto Rico intends to be in the best of two worlds, arguing that the court has no jurisdiction to hear this case on the one hand, and on the other asking this Supreme Court for jurisdiction aid to adjudicate the merits of the case, without there ever been an evidentiary hearing, an essential part of due process of law.

Faced with this factual picture, this Supreme Court must take as true the facts alleged in the complaint, inasmuch as in the procedural stage in which this complaint is in, the discovery of necessary evidence has not been allowed for the plaintiffs to prove their case. The plaintiffs were not even allowed to present the evidence that they have at the moment to establish part of their allegations.

Therefore, for the purpose of evaluating the merits of the filed complaint, this Court must stem from the inarticulate premise that the allegations of the complaint are true and correct; otherwise, it would be adjudicating validity to some facts without having evaluated any evidence. This action, in our opinion, would constitute a violation of due process of law of the plaintiffs, for they would be deprived of their right to discover evidence and present such evidence before an impartial judge for evaluation who may then make his/her respective findings of fact. In this context in

which it is sought to adjudicate the merits of the filed complaint as well as the allegations of constitutional nature that it involves.

In the case at bar, the plaintiffs are alleging various causes of action, some of procedural constitutional nature and others of substantive constitutional nature. With respect to the claim of procedural constitutional nature, the plaintiffs in accordance with the existent facts at the time of filing their complaint, questioned the defective manner in which the alleged notification of their seniority period in public employment was made, as well as the defective notification that the State made regarding dismissals that they seek to impose by decree. These violations constitute an infringement of the most elemental constitutional rights of the plaintiffs, as well as a violation of the rights acquired by these. On the other hand, the plaintiffs also attack the constitutionality of Chapter III of Law 7. The attack on the constitutionality goes further than a mere question of the process of notification, questioning of the due process of procedural law, and transcends said boundaries, to go into the true underlying problem in the law, that is to say, it questions the intrinsic validity of the norm itself, as articulated and instrumented by the government. In this sense, the plaintiffs question the constitutional validity of the statue (Chapter III, Law 7) for it threatens the fundamental rights acquired by the plaintiffs, violates and infringes the contractual obligations assumed by the State and the Union to which the plaintiffs belong, it violates the equal protection of the laws, by creating suspicious classifications between public employees without rational justification for the same, exempting the judicial and legislative branches from its applicability and violates, moreover, the constitutional clause that prohibits that a

person be deprived of their right to life (work) and to property (the right acquired over an employment) without due process of the law.

On the other hand, the plaintiffs in turn, beyond questioning the constitutional validity of the law, are alleging that its implementation, even under the assumption that this Court interprets that it does not violate the clear and express text of the Constitution of the Commonwealth of Puerto Rico and of the United States of America, their constitutional rights are being breached. Specifically, the plaintiffs in the complaint allege that the immediate dismissals were made without just cause, without prior filing of charges and respond to a pattern of discrimination because of political ideas, as well as discrimination because of age and gender. This type of discrimination is forbidden by our constitution and these causes for action are different and independent from the rest of the causes for action contained in the allegations of the complaint.

Now, as pointed out before, the state cannot expect for the case at bar to be examined leaving aside the facts. But this is not about stemming from premises that have not been established through the presentation of proof or evidence in which the allegations of the parties are sustained. This here is about differentiating between the well alleged facts in the complaint, that the Court at this moment should take as true, and the facts that have not been proven, by direct or circumstantial evidence and much less being denied through an answer to the case at bar. That is to say that the Commonwealth of Puerto Rico expects to part from the premise, not proven or evidenced, that a fiscal deficit in the government exists. This assertion is a mere allegation of the government and has not been demonstrated or sustained through evidence, direct or circumstantial,

reason why this Court cannot take as true or established such fact essential to the controversy. Undoubtedly, if this court does not have before it any evidence that sustains or supports the allegation of the State of a supposed fiscal crisis, then it cannot make judgments on the inarticulate premise that supposes the implementation and instrumentation of the fateful Law 7. That is to say, the government has erected as a justification to abolish, abrogate, and infringe the proprietary rights of the plaintiffs, the non-evidenced excuse of a supposed fiscal crisis. In the same manner that it has been repeating "ad nauseam," the same tagline: we are in the middle of an emergency and that emergency is called fiscal crisis, in name of the emergency, I almighty State, can do what I want, as I have a valid and legitimate excuse for it. This is the crux of the matter, that is to say, for the Court to determine that Law 7 is constitutional, it is necessary for it to have evidence that demonstrates that such fiscal crisis does exist. From there parts the necessity to celebrate an evidentiary hearing that demonstrates that what is alleged by the State is correct, for it cannot jump to that conclusion in the absence of evidence that sustains such claim. In that sense, it is the State that has the burden of proof to demonstrate that the alleged excuse to implement this law is true.

Now, in the absence of evidence to show that what is alleged by the State, in its briefs and arguments, all is left to do is to make an analysis in a vacuum, that is to say, without facts that sustain the application of Law 7, at least as to the State, in relation to the allegations of the plaintiffs, these should be taken as true at the procedural moment in which jurisdiction was assumed by this Court in the case at bar. Parting from that premise, it is a true, undisputed fact that the plaintiffs

are career employees. It is also true and undisputed fact that they belong to the Union of Public Servants of Puerto Rico (SPPR/AFSCME). At the same time, it is an undisputed fact that they have been notified of the intention of dismissing them from their positions, over which they have proprietary rights, without being charged and without just cause for this. It is also an undisputed fact that at the moment of notifying the intent to dismiss them from the government, they are protected by a collective bargaining agreement signed by the union which represents them with the government. It is also an undisputed fact that their positions have not been eliminated by the government.

Before this uncontroverted factual situation, sought to be eliminated by a knock and a thump with a legislative and executive stroke, are all of the acquired rights of the plaintiffs as recognized by the laws, statutes and agreements granted by the parties. May it be observed that the unusual Law 7 eliminates and/or suspends all of the guarantees that safeguard these public employees that have proprietary rights over their employment and enjoy countless acquired rights, in violation of their constitutional rights. The plaintiffs, by virtue of Law No. 45 of February 25, 1998 as approved by the government, exercised their right to be a member of a union. As part of these rights recognized by law, they participated in a process of collective bargaining negotiation. By virtue of this, they subscribed through the union, a collective bargaining agreement. This collective bargaining agreement is a contract granted between the government and union member employees. The government, after negotiating a collective bargaining agreement and having incurred in a contractual obligation, intends to go against its own actions and benefit from its actions by implementing Chapter III of Law

7, leaving the plaintiffs as orphans of remedy, eliminating or suspending the acquired rights of public career employees. Law 7, in its exposition of motives, articulates in its introduction an apology decreeing that this does not impair contractual obligations, that is to say, the legislature becomes a judge and a party of its actions, taking over the duty of the judicial branch which is in the last resort called to interpret the laws and adjudicate whether they are constitutionally valid or not. The action of the government, arbitrary and capricious, is totally and absolutely unilateral, without rational justification, demonstrated through sustainable proof and constitutes a clear and unequivocal impairment of contractual obligations. Also note that such action does not only impair the contractual obligations of the government with the union member plaintiffs, it also deprives them of fundamental rights.

This Court has established in its jurisprudential agreement, that the right to life and property, are fundamental rights of the citizens that form part of this country. In this manner, it has recognized that a public employee has proprietary right over his/her employment and that he/she may not be deprived of his/her proprietary right without the guarantee of the due process of law, substantive and procedural. The fateful Law 7 eliminates, without due process of the law, all of the rights acquired by the plaintiffs throughout the years that they have offered their services to the government. By doing so, not only does it violate their constitutional rights of life and property, but it also eliminates acquired rights that were forged through the inexorable passing of time. Rights such as collective bargaining, the principle of merit as a milestone of public service, the right to be employed and the right not to be deprived of employment without just cause

and previous filing of charges, the right to cross examine evidence held against them, as well as the right to a due process of the law are alienated by disposition of a legislative assembly and a Governor by the power acquired through the electoral political process, breached, and eliminated.

Cynicism enthroned in the law itself is very eloquent. One of the contentions presented in the plaintiffs argument is that the law itself eliminated the possibility for the plaintiffs to vindicate their infringed and breached rights, impulsively and arbitrarily by the State. The usual Law 7 provides that all of the agreements be temporarily suspended. That is to say, nothing that was collectively negotiated has any validity. Therefore, any allegation, before the administrative forum designated by the same, results futile and banal, it is merely a pro forma exercise. The law itself unbelievably establishes that the collective bargaining agreement is no good, that is to say, it is not enforceable as a source of obligations between the employee and the employer (government). Moreover, the infamous Law 7 provides that, in the case of union members, these should go to the pertinent forum, the Labor Relations Commission, to vindicate their rights; however, the law itself decrees that nothing that is implemented or provided through the mechanisms that the law itself implements can be considered a violation to the existing collective bargaining agreements or a refusal to negotiate in good faith or an unlawful practice. The paroxysm of cynicism cannot be greater. The Legislative Assembly has emerged as judge of its own actions by establishing in advance, the standard and rule in question, providing as an alternative for dismissed employees, a review in pro forma, unsubstantiated and illegal, for being unconstitutional. To the extent that

the administrative forum, has before itself a law that violates all of the acquired rights that are recognized for public employees, including the rights that are constitutionally protected, but at the same time decrees that such violation cannot be considered a violation to the collective bargaining agreement or an unlawful practice, is assured in advance of the logical result of any review, complaint or grievance (appeal) that is filed before the aforementioned administrative forum. This administrative forum does not have the authority to decree that Law 7 is unconstitutional and therefore it shall be limited to the mechanical and dogmatic application of the text of the law. For such reason the alternative of administrative review, as instrumented in Law 7, is patently unconstitutional. The administrative forum becomes a dead end for the employee who tries to vindicate his/her rights and from which he/she may never come out successful, because the law itself makes it impossible, a priori, to obtain justice that is effective and enforceable at law. Hence, the State, through Law 7 has articulated its own insurmountable unyielding, unquestionable defense. From there comes the urgent need for this Court as the highest interpreter of the law and the Constitution, and as guardian and custodian of the guarantees contained in the Bill of Rights, to intervene immediately in the controversy at hand and decree in the light of our legal traditions and the clear text of the Constitution of the Commonwealth of Puerto Rico, that Chapter III of Law 7 is plainly unconstitutional.

VI—Sulica

Wherefor, we very respectfully request from this Honorable Court to become aware of the allegations outlined in this statement, to declare Chapter III of Law 7 unconstitutional, and to implement remedies as

requested and to issue any statement that proceeds in applicable law and justice.

VII—Notification

[OMITTED]